Calendar No. 918

98TH CONGRESS *2d Session*	SENATE	REPORT 98-476

PRODUCT LIABILITY ACT

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 44

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

MAY 23 (legislative day, MAY 21), 1984.—Ordered to be printed

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REPORT
98-476

PRODUCT LIABILITY ACT

MAY 23 (legislative day, MAY 21), 1984.—Ordered to be printed

Mr. PACKWOOD, from the Committee of Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 44]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 44) to regulate interstate commerce by providing for a uniform product liability law, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill do pass.

PURPOSE OF THE BILL

The bill, S. 44, as reported, creates uniform standards of product liability law throughout the United States.

Conflicting product liability rules have made it difficult for injured persons to know their rights and for manufacturers and product sellers to know their obligations. This has created expensive and burdensome legal costs which are passed on to consumers. The product liability problem has created a serious burden on interstate commerce, and Federal legislation is needed to address the cause of the problem.

S. 44, as reported, addresses these problems by establishing uniform standards to be applied in all product liability actions in State and Federal courts. The bill will provide clear and reasonable guidelines so that parties can identify their rights and obligations.

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BACKGROUND AND NEED

INTRODUCTION

In the mid-1970's, product liability was recognized as a serious problem of interstate commerce which, in the view of many businesses and academic observers, had reached "crisis" proportions. This recognition came as a result of an increase in product liability claims and litigation and an increase in product liability insurance premiums.

The Federal Government responded to these concerns in 1976 by creating a Federal Interagency Task Force on Product Liability (hereinafter "Task Force") to examine the product liability problem. The Task Force, chaired by the Department of Commerce, conducted an 18-month study which culminated in a series of reports confirming the legitimacy of the business community's concerns.[1] There was substantial evidence that the cost of product liability insurance had increased dramatically in the early to mid-1970's and evidence that the number of product liability actions had increased.[2]

The Task Force identified the causes of the product liability problem.[3] Of these causes, two principal causes were overly subjective insurance ratemaking procedures and uncertainties in the product liability tort litigation system.

THE RISK RETENTION ACT PROVIDES ALTERNATIVE MECHANISMS FOR PURCHASING PRODUCT LIABILITY INSURANCE

In 1977, the Task Force identified ratemaking procedures of liability insurers as one principal cause of the product liability problem. The available evidence showed that incurred product liability underwriting losses (including claims paid, loss reserves and loss adjustment expenses) had risen faster than product liability premiums.[4] In the period from 1974 to 1976, insurers responded by increasing product liability rates. Because product liability coverage was almost always sold as part of a comprehensive general liability package. Specific data on ratemaking procedures and on profits or losses in the product field were generally unavailable.[5] Thus insurers were forced to base their rate increases on subjective judgments by underwriters rather than on reliable claim statistics. The Task Force concluded that the rate increases, which contributed and brought attention to the product liability problem, were overly subjective.

In 1978, the Department of Commerce formed a second Task Force on product Liability and Accident Compensation. This new Task Force developed an options paper outlining what action, if

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[1] *E.g.*, Final Report of the Task Force on Product Liability, 1 vol. (May 1977); Legal Study, 7 vols. (March 1977); Insurance Study, 1 vol. (March 1977); Industry Study, 2 vols. (April 1977).

[2] Final Report of the Task Force on Product Liability at I-26 (May 1977).

[3] *Id.* at xxxiv-xvix, I-21 to I-29. In addition to overly-subjective ratemaking practices and uncertainties in the tort-litigation system, the Task Force also identified unsafe manufacturing practices as a cause of the product liability problem.

[4] An independent contractor commissioned by the Task Force concluded that insurers showed substantial underwriting losses on product liability insurance from 1971 to 1974.

[5] The insurance industry now collects much more product liability data as a result of the Insurance Services Office New Commercial Statistical Plan.

any, the Federal Government should take to address the causes of the product liability problem.[6] With regard to the insurance ratemaking aspect of the problem, the options paper proposed Federal legislation, now referred to as the "Risk Retention Act," which was subsequently enacted into law during the 97th Congress.[7]

The Risk Retention Act is designed to resolve the problem of overly subjective ratemaking procedures by creating two alternatives to the ordinary purchase of product liability insurance. First, the act facilitates the formation of self-insurance cooperatives, know as risk retention groups. Prior other act, such groups had been extremely difficult to form, because they were subject to conflicting and duplicative regulations among the various states. The second alternative created by the act is the purchasing group. Businesses forming purchasing groups can now bargain collectively for lower commercial liability insurance premiums.

The options of self-insuring or banding together to obtain lower group insurance premiums encourages commercial insurers to offer product liability insurance at competitive rates and to set premiums accurately. Business leaders have testified before the Consumer Subcommittee of the Committee that the insurance ratemaking aspect of the product liability problem has been resolved.[8]

S. 44 WILL ADDRESS THE PROBLEM OF UNCERTAINTIES IN THE PRODUCT LIABILITY TORT LITIGATION SYSTEM

S. 44 addresses the second major underlying cause of the product liability problem—uncertainties in the product liability tort litigation system. Discussed below are: (1) the sources of the uncertainties in the product liability tort litigation system; (2) the reasons States cannot effectively resolve the uncertainties; (3) the need for and benefits of prompt Federal action; and (4) the reasons Federal action will resolve the uncertainties.

1. There are several sources of uncertainty in product liability law.

Product liability law governs private litigation relating to harms caused by products and defines the rules that determine whether a manufacturer or product seller is responsible for the harms. This area of law and the litigation that surrounds it are fraught with uncertainties as a result of three interrelated factors.

First, the uncertainty can be traced in part to the evolution of product liability law from contract and tort law theories.[9] A single product liability claim can, in most States, be brought both on tort theories, such as negligence, strict liability, and fraud, and on contract theories, such as breach of warranty. This mixture of legal theories raises questions, such as the type of damages that are recoverable. Further, the mixture created conceptual problems for

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[6] Options Paper on Product Liability, 43 Fed. Reg. 14612 (April 6, 1978).

[7] Pub. L. No. 97-45, 95 Stat. 949 (1981).

[8] Product Liability Act: Hearings on S. 44 Before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation, 98th Cong., 1st Sess. 199, 275 (1983).

[9] *E.g.*, Prosser, Wade & Schwartz, "Cases and Materials on Torts" at 743 (7th ed. 1983) ("The action . . . for breach of warranty is a freak hybrid, 'born of the illicit intercourse of tort and contract,' and partaking the characteristics of both."); Keeton, Owen, & Montgomery, "Products Liability and Safety: Cases and Materials" at 18 ("[Product Liability] is a mixture of tort law . . . and the contract law of sales . . .").

the parties and the triers of fact. As one commentary notes, "many of the most difficult products liability issues facing courts today spring from the doctrinal mixture of contract and tort." [10]

Second, there are uncertainties inherent in the fact that product liability law is developed almost exclusively by judges in State courts.[11] The rules vary from State to State and also within each State. This creates great uncertainty as to the applicable legal rules. Decisions on virtually every aspect of product liability law illustrate great variations among the States and constant changes in legal rules within a State.

For example, the law in most States prohibits plaintiffs from using evidence of a defendant's new product safety improvements to show that an older product is unsafe. However, a few State courts do not apply this rule of evidence in product liability cases.[12] As a result, manufacturers are uncertain about whether to undertake product improvements and, thereby, expose themselves to potential challenges. Similarly, product liability tort law traditionally deals with injuries to persons and damage to property. Pure commercial losses or harms, such as damage to the product itself, are generally left to applicable contract and commercial law. Some States, however, have begun to erode this principle, which has resulted in confusion.[13]

Even some basic issues of product liability law, such as the standard for determining when a manufacturer is responsible for harm caused by a defectively designed product, are not well-settled in State law.[14] For example, depending on which State law applies, a product may be defective in design if: (1) it fails to perform as safely as an ordinary consumer would expect when used in a reasonably foreseeable manner, or the defendant fails to prove that the benefits of the product outweight the risks; [15] (2) it is unreasonably dangerous taking into consideration the utility of the product and the risk involved in its use;[16] (3) it would not have been put into commerce by a reasonable person aware of the harmful nature of the product,[17] or (4) it left the supplier's control lacking any element to make it safe for intended uses or possessing any feature that renders it unsafe for intended uses.[18]

Some States require proof that the design defect rendered the product "unreasonably dangerous," While others do not.[19] A man-

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[10] Owen, Keeton, & Montgomery, supra note 9, at 19.

[11] Many states have codified specific issues of product liability law. While this eliminates some uncertainty about the law within the state, it does not resolve the problems of uncertainty facing those who do business on an interstate basis.

[12] Compare *Knight* v. *Otis Elevator Co.*, 596 F.2d 84 (3d Cir. 1979) with *Abel* v. *J.C. Penny Co.* 488 F. Supp. 891 (D. Minn. 1980); *Schuldies* v. *Service Machine Co.*, 448 F. Supp. 1196 (E.D. Wis. 1978).

[13] Compare *Schiavone Constr. Co.* v. *Elgood Mayo Corp.*, 439 N.Y.S. 2d 933 (App. Div. 1981) and *Berg* v. *General Motors Corp.*, 555 P. 2d 818 (Wash. 1976) with *Hones & Laughlin Steel Corp.* v. *Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980).

[14] *See generally*, Hearings on S. 44, supra note 8, at 67–74, statement of James B. Sales.

[15] *E.g.*, *Caterpillar Tractor Co.* v. *Beck*, 624 P.2d 790 (Alaska 1981); *Barker* v. *Lull Engineering Co.*, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

[16] *E.g.*, *Turner* v. *General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).

[17] *E.g.*, *Wilson* v. *Paper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978), *Phillips* v. *Kimwood Machine Co.*, 525 P2d 1033 (Or. 1974).

[18] *E.g.*, *Azzarello* v. *Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978).

[19] Compare *Eickelberg* v. *Deere & Co.* 276 N.W.2d (Iowa 1979) with *Cronin* v. *J.B.E. Olson Corp.* 501 P.2d 1153 (Cal. 1972).

ufacturer seeking to avoid design defect liability faces the difficult task of meeting the design standard in each State in which it does business.

The variations among the States on these and almost all other aspects of product liability law create uncertainty within the tort litigation system. Manufacturers who do business on an interstate basis are unable to predict which of the multiple legal standards will apply to them or whether a particular standard will remain constant.

Third, the uncertainties in the product liability tort litigation system are in part attributable to conflicting philosophies about tort law. These conflicting philosophies are best illustrated by the divergent approaches to strict liability. Although negligence or fault-based principles have been the traditional bases for recovery in tort actions, strict liability has also been recognized as a basis for recovery to one degree or another in most States.

The traditional view of strict liability limits the theory to manufacturing or construction defect cases and to breach of express warranty cases.[20] Strict liability is justified in construction defect cases, where a product fails to conform to the standards established by the manufacturer. It is reasonable for consumers to expect that the product will conform to the manufacturer's own standards. A jury can readily determine if the product was mismanufactured by making an objective comparison of the product in question with the product the manufacturer intended to make. Likewise, strict liability in express warranty cases is also consistent with traditional tort law concepts. The manufacturer should be held responsible for harms caused by its failure to meet its own representations.

These traditional justifications for strict liability are not present in design and warning defect cases. There is no objective measure for determining if a defect exists. If a particular design or warning is found to be defective, then all the products incorporating or using that design or warning will be defective. Under strict liability, the manufacturer could be responsible for product harms regardless of its care in designing or warning about the product. Under the law in most States, a manufacturer's liability is based on whether the manufacturer acted unreasonably in choosing the product design or in failing to provide an adequate warning about the product.

Some courts reason that manufacturers and product sellers are in a better position than claimants to pay and distribute the risks of liability, and therefore they should be liable. Damages for harms caused by a product are paid not because of the wrongful conduct by defendants, but because of a social policy judgment about which party should bear the loss.

The philosophical differences in the two approaches to strict liability create conflicts which pervade product liability law. As a result, the standards of responsibility in product cases are blurred and confused.

In sum, a mixture of legal theories, a wide and ever-changing set of common law rules, and fundamental differences about the underlying based of tort law itself cause uncertainties in product li-

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[20] Wade, "On Product 'Design Defects' and their Actionability," 33 Vand L. Rev. 551 (1980).

ability law. As a result, the legal standards applicable to a product liability claim are uncertain and unpredictable.

2. States cannot effectively resolve the uncertainties.

After the causes of the product liability problem were identified, the Task Force issued on options paper in 1978 which suggested that a model product liability act be drafted with the idea that uniform standards of responsibility would be enacted at the Federal level.[21] A model law was drafted and over 1,500 pages of public comment were received. A final version of the model law, known as the Uniform Product Liability Act (UPLA), was published on October 31, 1979.[22]

UPLA, ultimately offered as a model State law, has not been adopted in full in any State. Over 30 States have adopted some form of product liability statute. However, those efforts at State law reform have not resolved the uncertainties in the product liability tort litigation system. Most State statutes are not comprehensive and fail to address the key issues that arise in product liability litigation. Even if an individual State adopted a comprehensive product liability statute so that its own law was clear and predictable, the legal rules would still vary from State to State.

Individual States cannot address the uncertainties of product liability law effectively, because certainty within one State does little to resolve the tort litigation problems facing those who deal in an interstate market. Products are manufactured, sold, used, and insured on a nationwide market. Data show that most products manufactured in a given State are consumed or used outside that State.[23] As a result, manufacturers and product sellers may be involved in product liability actions governed by the law of any State in which they do business. An attempt by one State to resolve the uncertainties in the tort-litigation system is not effective.[24]

Experience with the State approach and the realities of the marketplace demonstrate that the individual States cannot resolve the uncertainties in the product liability tort-litigation system.

3. There is a need for Federal action to resolve uncertainties in product liability law.

Uncertainties in the product liability tort-litigation system have a serious impact on interstate commerce and, ultimately, and adverse effect on the economy and society generally. A comprehensive Federal law, such as S. 44, would establish uniform standards for all product liability claims and would eliminate much of the uncertainty and reduce the associated adverse effects of those uncertainties.

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[21] 43 Fed. Reg. 14612 (April 6, 1978).

[22] 44 Fed. Reg. 62714 (October 31, 1979).

[23] *See* Product Liability Reform: Hearings on S. 2631 before the Subcommittee on the Consumer, Senate Committee on Commerce, Science, and Transportation, 97th Cong., 2d sess. (1982). Serial No. 97-109.

[24] Several State Governors have recognized this in vetoing proposed product liability legislation.

a. Litigation and transaction costs

Uncertainty about the law of product liability increases the costs of litigating a claim. Time and effort must be expended by all parties to determine what the applicable legal rules are. Further, the possibility that a court may adopt a new legal standard in a given case gives the parties the incentive to argue for adoption of a new standard which would aid their case. Parties may have to brief and rebrief the same legal arguments repeatedly. Because the law is unclear and because, even if it were clear, it may change, parties have great difficulty evaluating the merits of their case. As a result, it is difficult to come to a rational settlement decision. Parties therefore incur the costs of litigating claims which could have been settled to the satisfaction of all involved.

The litigation and associated transaction costs involved in investigating, pursuing, and defending these claims are passed on to consumers in the form of higher product prices. These costs are by no means insignificant. According to calculations derived from a 1977 survey conducted by the Insurance Service Office, for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs.[25] And for every dollar awarded to a claimant, he or she pays an average contingent fee of 33 cents in legal costs and therefore receives about 67 cents. Thus, one can estimate (adding the average defense cost to the contingent fee) that the product liability tort litigation system appears to cost more in litigation and transaction costs than the net recovery received by the claimant.

A more recent study by the Rand Corporation further demonstrates the high cost of legal services in connection with product liability claims. The study found that for every $59 that is paid to claimants in product liability cases, $99 is paid for legal services by both claimants and defendants.[26]

The testimony of a press brake manufacturer illustrates the magnitude of these legal and transaction costs:

> During the most recent fiscal year, our small company and its insurers paid out $850,000 for product liability claims. But only 18 percent of that amount went to pay settlements to claimants. About $700,000 went for defense lawyers and other transaction costs.
>
> I firmly believe that a uniform set of balanced product liability rules would have saved our company and its insurers over 60 percent of the $700,000 we have expended. I also estimate that about $100,000 of the above would result in savings because of uniformity, thus eliminating the current need for our attorneys to research and brief conflicting laws in 50 States in an effort to persuade courts to change or sustain particular rules of law.
>
> Second, many transaction costs will be eliminated, if the law is made more balanced and predictable. If everyone concerned—claimants, defendants, lawyers, judges, and manufacturers—know what the rules are, many claims

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[25] Insurance Services Office Product Liability Closed Claim Survey, a Technical analysis of survey Results at 11 (1977).

[26] J. Kakalik, P. Ebener, W. Felsteiner and M. Shanley, "Costs of Asbestos Litigation" (July 1983).

without merit will never be started. Over the years we have lost only four verdicts out of the many claims that we have defended.

We average over $30,000 in defense costs on claims that proceed through trial. But we average about $5,000 in investigating and defending each claim we receive, regardless of the eventual disposition. We settle many of these claims for relatively small amounts of money, because it costs less to settle them than it does to defend them in court. If claimants and their lawyers knew in advance that they would be required to prove fault in design and warning defect cases—and if there were a reasonable period of repose for average products—most of these claims would never be filed.

S. 44 will benefit all parties and the economy by reducing unnecessary litigation and transaction costs. This will be achieved through the enactment of clear uniform legal standards and through a clarification of specific aspects of product liability law.

b. Insurance costs

The current uncertainties in the product liability tort litigation system contribute to the costs of product liability insurance. Insurance rates reflect the fact that manufacturers and product sellers are unable to predict the legal standards which will apply in future claims against them and the fact that the uncertainties create litigation and transaction costs. These insurance costs are passed on to consumers in the form of higher product prices. Enactment of uniform Federal product liability standards will stabilize product liability insurance costs, primarily due to the reduction in litigation and transaction costs.

c. Production costs

Uncertainties in the product liability litigation system have an adverse impact on productivity. This is manifested in several ways.

First, legal expenses involved in keeping abreast of variations and changes in the law, not to mention investigating and litigating a claim, divert resources from productive efforts. Similarly, excessive management time is diverted from production to the assessment of legal claims.

Second, uncertainties and variations in product liability tort law may deter the development of new products or product improvements. For example, manufacturers have justification for believing that evidence of product improvements may be used against them as evidence that an older product is defective. The result is clearly not in the best interests of the consumer.

Finally, businesses may eliminate a particular product line or terminate operations altogether if the costs of product liability exposure become too burdensome. As a representative of the machine tool industry stated in a letter to the Committee:

> The problems of a manufacturer mirrow [sic] those of society in the staggering number of law suits springing up everywhere. My family has been involved in the manufacturing business for 136 years. One month ago, James

> Hunter Machine Company, Inc. filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code, not so much because business conditions are poor, but because of a little understood, yet all too familiar concern of American manufacturers-product liability.
>
> Under six generations of Hunters, the present company and its predecessors have been among the largest employers in the community. Western Massachusetts, classified as a depressed area, can little afford this loss of 200 skilled jobs. We filed Chapter 11 because the current status of product liability laws make it impossible to continue. After two recent court battles and a quarter of a million dollars in payments, we had the choice of fighting with lawyers the rest of our lives or filing for reorganization. At the present time, we have been named in 20 suits. A review of only those claims where a specific demand has been made (only one-half the claims) discloses product liability demands in excess of $17 million. We know of 11 additional accidents which may result in suits, and live with the uncertainty of future accidents on which we have no control.[27]

Enactment of uniform Federal standards applicable in all product liability cases will relieve some of these drains on productivity and the concomitant adverse effects on the economy.

d. International trade

Uncertainties in the product liability tort litigation system have an adverse effect on international trade.

American manufacturers and product sellers generally pay product liability insurance rates which are 20 times higher than those in Europe.[28] This disparity is attributable in large part to the uncertainties in the American tort litigation system.[29] As a result of the disparity, American manufacturers and product sellers may be at a competitive disadvantage in both foreign and domestic markets. Insurers generally do not discount premiums where a manufacturer exports its goods, because there is always the possibility that a product-related suit will be brought in the United States. Thus, each U.S. product shipped abroad contains an insurance cost element greater than that of a foreign competitor.[30] Domestically, the effect of the current uncertainties in product liability law is similar. The price of imported products can be lower because product liability insurance rates for those products are lower.[31]

Enactment of uniform Federal product liability law will improve the competitive position of American business at home and abroad.

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[27] Hearings on S. 44, *supra* note 8, at 357 (letter from Durant A. Hunter, Vice President, James Hunter Machine Co., Inc., April 29, 1983.

[28] See T. Marriott, "Product Liability and International Trade," Product Liability and Tort Law Reform, National Legal Center for the Public Interest, at A-128 (April 21, 1982).

[29] *Id.*

[30] *See* F. Orban, "Product Liability and International Trade and Policies," Product Liability and Tort Law Reform, National Legal Center for the Public Interest, at 144 (April 21, 1982).

[31] *See* letter from James H. Mack, Public Affairs Director, National Machine Tool Builders Ass'n, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office of Management and Budget (June 10, 1982.

4. A Federal product liability law will resolve the uncertainties.

The current climate of uncertainty in product liability law imposes serious burdens on interstate commerce. A Federal product liability law will reduce these burdens by achieving uniformity among State and Federal courts.

The enactment of this kind of law is within Congress power to regulate interstate commerce.[32] There are numerous examples of Federal legislation in areas where diverse State laws were deemed a burden on interstate commerce.[33] The fact that product liability law is traditionally an area of State law does not alter the fact that Federal legislation in this area, under the Supremacy Clause, can preempt State law.[34]

Just as the Federal Employers' Liability Act [35] achieved certainty and uniformity through Federal tort law rules for railroad employees injured in interstate commerce, so will S. 44 achieve uniformity and certainty in product liability tort litigation.

Legislative History

This proposal evolved from more than 45 days of hearings before six congressional committees over a 7-year period. These hearings investigated all aspects of the product liability problem.[36]

In October 1979, the Department of Commerce published in the Federal Register a Model Product Liability Act to be adopted by the States. This model act was subject to extensive public comment.

Based on the congressional hearings and numerous bills, the Federal Uniform Product Liability Act, H.R. 7921, was introduced in mid-1980. Senator Kasten reviewed H.R. 7921 and in April 1981, asked the Committee staff to prepare a draft product liability bill, incorporating the principles of H.R. 7921. In October 1981, the draft bill was circulated for public comment. The Committee received over 2,000 pages of comment and made extensive changes to the draft bill taking into account a wide diversity of views.

In March 1982, prior to the introduction of S. 2631, the Subcommittee held 2 days of intensive hearings on the need to reform product liability law.[37] Then, after the introduction of S. 2631 by Senator Kasten on June 16, 1982, the subcommittee held 2 days of additional hearings on the bill.[38]

On October 1, 1982, the Committee reported the bill by voice vote.[39] No further action was taken on the bill in the 97th Con-

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[32] U.S. Const., Art. I, § 8, cl. 3.

[33] E.g., Public Utility Holding Company Act, 15 U.S.C. §§ 79a et seq. (1976) (activities involved "not susceptible of effective control by any state"); Cotton Standards Act, 7 U.S.C. §§ 51 et seq. (1976) (uniform national classifications necessary to protect and promote commerce); Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq. (1976) (national standards essential in order that "commerce and the national economy . . . [not be] impeded by diverse, nonuniform . . . regulations").

[34] U.S. Const., Art. VI, cl. 2.

[35] 45 U.S.C. §§ 51 et seq. (1976).

[36] For example, in 1977, the House Subcommittee on Capital Investment and Business Opportunities held fifteen days of field hearings on product liability insurance and in 1979, the House Subcommittee on Consumer Protection and Finance held nine days of hearings on the product liability problem.

[37] Hearings on the need for product liability reform were held on March 9 and 12, 1982. *See generally,* Hearings on S. 2631 *supra* note 23.

[38] Hearings on S. 2631 were held on June 30 and July 1, 1982. *See generally,* Hearings on S. 2631 *supra* note 23.

[39] S Rep. No. 670, 97th Cong., 2d Sess. (1982).

gress. On January 26, 1983, Senator Kasten introduced S. 44, the Product Liability Act, in substantially the same form as it was reported in the 97th Congress. Two days of hearings were held on the bill in the first session of the 98th Congress.[40] One additional hearing was held in the second session of the 98th Congress.[41] During the hearings held in the 98th Congress, the subcommittee heard testimony from a number of organizations and businesses, including the Product Liability Alliance, the National Association of Wholesaler-Distributors, the National Association of Manufacturers, the National Machine Tool Builders Association, the Association of Trial Lawyers of America, the Consumer Federation of America, the National Consumers League, Public Citizen Congress Watch, and from legal scholars, small and medium size businesses and their associations.

On September 9, 1982, the administration gave its support for the concept of Federal product liability standards.[42] On July 20, 1983, the administration again endorsed the concept of Federal legislation providing uniform product liability standards and specifically endorsed S. 44.[43]

Summary of Major Provisions

RESPONSIBILITY OF MANUFACTURERS

In any product liability action, a manufacturer is liable if the claimant establishes by a preponderance of the evidence that (1) the product is unreasonably dangerous in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product did not conform to an express warranty, and (2) the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant.

A product is unreasonably dangerous in construction or manufacture if it deviated from the manufacturer's design specifications, formula or performance standards or from otherwise identical units manufactured to the same manufacturing specification or formula. A manufacturer is, then, strictly liable for mismanufactured products if the deviation in the product caused the claimant's harm.

A product is unreasonably dangerous in design or formulation if (1) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the danger which caused the claimant's harm, and (2) a reasonably prudent person would not have made the product or used the design that the manufacturer used. A product is not unreasonably dangerous in design if (1) a means to eliminate the danger was not within practical technological feasibility and the benefits and usefulness of the product to the public outweighed the likelihood and probable seriousness of the harm; (2) the harm was caused by an unavoidably dangerous aspect of a product (*e.g.*, the risks of rabies vaccine injections are unavoid-

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[40] Hearings were held on April 6 and 27, 1983. *See generally*, hearings on S. 44 *supra* note 8.
[41] The hearing was held on March 5, 1984. *See generally*, hearings on S. 44 *supra* note 8.
[42] *See* letter from Secretary of Commerce Malcolm Baldrige to Senator Robert W. Kasten, Jr., September 9, 1982.
[43] *See* letter from Secretary of Commerce Malcolm Baldrige to Senators Bob Packwood, Robert W. Kasten, Jr., Ernest F. Hollings, July 26, 1983.

able because they cannot be eliminated without impairing the vaccine's benefits); or (3) the harm was caused by an unsafe aspect of a product that was inherent in the product (*e.g.,* the sharp edge of a knife).

A product is unreasonably dangerous because of a failure to provide adequate warnings or instructions if (1) the manufacturer knew or, through the exercise of reasonable prudence, should have known of the existence of the danger which caused the claimant's harm; (2) the manufacturer failed to provide warnings that a reasonably prudent person would have provided; and (3) the warnings or instructions would have prevented harm to a product user in the course of reasonably anticipated conduct. In addition, the manufacturer may be responsible for failure to warn if, after the product was made, the manufacturer discovered or should have discovered the danger which caused the claimant's harm and failed to provide post-manufacture warnings to the claimant as a reasonably prudent person would have done.

Warnings or instructions must be given to a product user unless they were provided to certain classes of persons who could be expected to pass the warning on to the users. A manufacturer is not liable for failure to warn about obvious dangers, consequences of misuse, alteration or modification.

A manufacturer is strictly liable for breach of express product warranties where the breach of the warranty caused the claimant's harm.

RESPONSIBILITY OF PRODUCT SELLERS

A product seller is liable if the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of the claimant's harm. Where however, the manufacturer is not subject to service of process or is determined to be judgment-proof, the seller may be responsible for harms attributable to the manufacturer.

DETERMINATION OF RESPONSIBILITY IN A PRODUCT LIABILITY ACTION AND EFFECT ON WORKERS COMPENSATION

The claimant's own conduct, contributory negligence, or assumption of risk does not bar recovery, but reduces compensatory damages awarded to the claimant by an amount proportionate to the claimant's responsibility. In addition to determining the amount of harm attributable to the claimant, the trier of fact will determine the percentages attributable to each defendant and to any other cause or person not a party to the action.

In apportioning responsibility among those who caused the harm, evidence that a misuse or alteration of a product caused the claimant's harm is relevant. Product misuse or alteration by another will not reduce the manufacturer's or seller's responsibility if it was reasonably anticipated conduct.

Damages in a product liability action would be reduced by the amount paid to the claimant under any state or Federal worker compensation law. This reduction does not affect the amount the claimant receives today, but takes the place of the employer's sub-

rogation lien, unless the manufacturer or product seller had expressly agreed to indemnify an employer.

TIME LIMITATION ON LIABILITY

If a product is a capital good, no claim alleging unsafe design or failure to warn in a product liability action may be brought for harm caused by the product more than 25 years after delivery to the first buyer or lessee not engaged in the business of selling or leasing the product. Capital good is defined as a product used in trade or business or held for the production of income.

These limitations on liability are not applicable if (1) the manufacturer or product seller intentionally misrepresented or fraudulently concealed information about the product; (2) the claimant's harm was caused by the cumulative effect of prolonged exposure to the product; or (3) the harm did not manifest itself until after the time limitation. Thus, claims for certain harms, such as harms from drugs, which do not manifest themselves until many years after product use, would not be barred by this section.

A 2-year statute of limitations for all product liability actions is provided under which the period does not begin to run until the claimant discovers or should have discovered *both* his harm and its cause. This "discovery rule" is more favorable to claimants than the "time of injury rule" followed by some States.

PUNITIVE DAMAGES

Punitive damages may be assessed if the claimant proves liability for compensatory damages and establishes by clear and convincing evidence that the harm suffered was the result of the reckless disregard of the manufacturer or product seller for the safety of product users.

Reckless disregard means conduct manifesting a conscious, flagrant indifference to the safety of persons who might be harmed by a product and constituting an extreme departure from accepted practice.

Following a determination by the trier of fact that punitive damages should be assessed, the judge would determine the amount of damages. The damages would be distributed to the claimant in an amount, if any, the judge determines appropriate and to a public purpose. There shall be only one punitive damage assessment for a single allegation of reckless disregard.

Taken as a whole, this provision recognizes that punitive damages in a product liability case are analogous to a criminal sentence and that the procedure for assessing them should be analogous as well. Thus, the provision requires a higher burden of proof, separates the role of the judge and the jury, and prevents repeated, multiple punishment for the same wrong.

SUBSEQUENT REMEDIAL MEASURES

Evidence of corrective measures taken by a manufacturer or product seller after a harm has occurred would not be admissible in court to prove liability. This preserves the incentive for manufacturers and product sellers to improve their products.

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JUDICIAL REVIEW PANEL

The judicial conference would be authorized to appoint a three member panel of legal experts to conduct a continuous study of the tort system and to suggest changes to the Congress, including ways to compensate persons who are injured by defective products but who are unable to prove negligence or to identify the manufacturer.

ESTIMATED COSTS

The cost impacts of the bill are summarized in the Congressional Budget Office cost estimate below, submitted in accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974. The Committee believes that the cost estimate should be viewed in the following context.

Section 10(b) of the act would prohibit any "employer" (or its workers' compensation insurer, if any) from pursuing a subrogation or other action against a manufacturer or product seller to recover the workers' compensation benefits paid to the employer's injured worker. The term "employer" would include the Federal Government.

Thus, the Federal Government's workers' compensation program, the Federal Employees Compensation Act (FECA), would be prohibited from seeking to recover FECA benefits paid to a Government employee injured in a product-related workplace accident. However, the Federal Government could continue to seek subrogation recoveries in workplace accidents in which no product was involved. For example, if a postal worker were injured in an automobile accident or bitten by a homeowner's dog in the course of his delivery rounds, FECA could seek to recover the benefits paid to the injured worker from the insurer of the nongovernment vehicle or the homeowner's liability insurer.1

In fiscal year 1983, FECA paid $926,237,000 in benefits to Federal workers for job-related injuries and illnesses. Of this amount, FECA recovered approximately $23,500,000, or 2.5 percent of its total claims payments, in subrogation actions against third parties responsible for the Government workers' injuries or diseases. Of this amount, $6,200,000 million, or .7 percent of total FECA claims payments is recovered from the manufacturers or sellers of products involved in the workers' illnesses or diseases.

Thus, the bill would deprive FECA of only ¼ of its current level of subrogation recoveries ($6,200,000 million out of $23,500,000), those involving product-related workplace accidents.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 14, 1984.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 44, the Product Liability Act, as ordered reported by the

Senate Committee on Commerce, Science, and Transportation, March 27, 1984.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 44.
2. Bill title: Product Liability Act.
3. Bill status: As ordered by the Senate Committee on Commerce, Science, and Transportation, March 27, 1984.
4. Bill purpose: S. 44 is intended to provide a standard product liability law among the states. In cases where the bill establishes a rule of law on an issue, it would preempt state laws on product liability. The bill also defines the responsibilities of manufacturers ans product sellers, and establishes the legal framework for resolving potential violations. It seeks to keep the workers' compensation system and the tort liability system separate in cases involving both work injury and product liability by barring (1) suits by an employer or its workers' compensation insurance carrier against a manufacturer or product seller to recoup funds paid in worker compensation cases, (2) employer liens against claimants' third party product liability recoveries and (3) suits by third parties against negligent employers to recover monies paid in product liability judgments. It also establishes a Product Liability Review Panel to conduct studies in the area of product liability.
5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1985	1986	1987	1988	1989
Budget authority	6.2	6.2	6.2	6.2	6.2
Estimated outlays	6.2	6.2	6.2	6.2	6.2

Note: The costs of this bill fall within various budget functions.

Basis of estimate

This bill would terminate an injured federal employee's obligation to sue in third party product liability claims, thus generating a cost to the federal government. Under current law, a federal worker injured in a work-related accident in which there is a third party product liability must sue the responsible third party for injury-related damages as a condition for receiving benefits under the Federal Employees' Compensation Act (FECA). Upon recovery of any damages through litigation, the injured individual must then reimburse the FECA program for benefits received. In most cases, by the time any damages have been recovered, the federal agency for which the injured individual worked has reimbursed the FECA program for the payment of benefits. Such damages remitted to FECA are credited to the Federal agency's account, offsetting that agency's future obligations to FECA. A Labor Department review of April 1982-February 1984 FECA claims showed that $6.2

million was recovered on an annualized basis through third party product liability litigation brought by injured federal workers. This is the amount which would be lost to the federal government through the termination of the responsibility to bring suit in such cases. Because the recover of such damages directly offsets FECA obligations, their loss would result in an increase in budget authority and outlays.

This bill would also end the ability of product manufacturers and sellers who have been forced to pay damages in product liability actions to injured federal workers to sue the federal government as an employer, thus eventually resulting in some savings. Until 1983, the federal government successfully argued that FECA's exclusive liability provision protected it from such actions. However, last year in Lockheed Aircraft Corporation v. the United States, 103 S. Ct. 1033, U.S.L.W. 4206 (1983), it was held that FECA's exclusive liability provision did not bar third party product liability defendents from seeking indemnity actions against the United States as an employer where State law allows such actions. Since then, according to the Justice Department's Civil Division, a small number of third party product liability defendents seeking nonsignificant amounts of damages have sued the federal government. However, there is usually a lag between the time of such landmark decisions and the generation of cases based upon such decisions. The Lockheed decision could eventually cause a flood of similar cases the bringing of which would be preempted by this bill, but as of now, there is no evidence of this.

The provision authorizing the establishment of a Product Liability Review Panel is estimated to result in costs of well under $100,000 per year.

6. Estimated cost to State and local governments: The bill's prevention of suits by (1) employers of injured workers against manufacturers or sellers of products responsible for the injury and by (2) third parties successfully sued by injured individuals against those individuals' employers could have an impact on state and local government budgets, but the size of the effect is uncertain. All states allow employers, including state and local governments, to sue the firm or firms involved in producing or selling a faulty good after having paid benefits on a workers' compensation claim involving product liability. The elimination of this subrogation lien would preclude state and local governments from receiving monies they generally collect and would thereby cause net budgetary increases. Seven states—West Virginia, New York, Illinois, Minnesota, North Carolina, Kansas, and California—permit third party tortfeasors to sue negligent employers to recoup part or all of product liability judgments. One of these states, West Virginia, bars these suits if the state, but not a municipality, is the employer. Preventing this type of action could result in savings to state and local governments when they are defendants in such suits.

Because all states currently permit the first type of litigation, which results in savings for state and local governments, while only a minority of jurisdictions sanction the second type, which results in costs, it is probable that prohibiting both types of actions would result in net costs for state and local government budgets.

However, in a survey by CBO, no state officials interviewed reported maintaining any records as to the amount of money paid out or taken in these two types of suits. Furthermore, each local governmental unit is autonomous and most likely would have a different experience.

7. Estimate comparison: None.

8. Previous CBO estimate: On November 29, 1982, CBO prepared a cost estimate for S. 2631, the Product Liability Act, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, October 1, 1982. This estimate is based on more recent information than the estimate for S. 2631 and also shows slightly higher costs.

9. Estimate prepared by: Richard Hendrix.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

The purpose of S. 44, as reported, is to create uniformity and certainty in product liability law, an area of the law that is currently a source of major confusion for all of the parties subject to it. The legislation accomplishes its goal of providing uniformity and certainty by creating clear and consistent product liability standards for State courts to apply in major areas of the law.

S. 44 creates no new regulations and imposes no additional regulatory requirements at either the State or the Federal level. Nor will the legislation change the jurisdiction of State or Federal courts.

While S. 44 will avoid adding any regulatory burdens to the product liability system, it will result in substantial cost and paperwork savings to all the parties affected by product liability lawsuits. First, the legislation will clarify a confusing area of the law. It will therefore save time and money for manufacturers, product sellers and consumers alike, each of whom will be able to determine their rights more readily than under current law. As a consequence, parties will be able to come to a greater number of pretrial settlements, thus reducing the number and length of product liability trials and the burden they impose on the State court system. Second, by providing uniform standards of liability, S. 44 will reduce planning and related legal costs for manufacturers who sell their products in a nationwide market. Because the legislation will create one standard to govern product design and warning cases, for example, nationwide manufacturers will no longer be forced to examine conflicting legal decisions in different product markets.

Thus, the Committee believes that S. 44 will bring about significant cost savings without imposing additional regulatory requirements. The Committee does not believe that the reported bill will have an impact on the privacy of individuals or businesses.

SECTION-BY-SECTION ANALYSIS

SECTION 1—TITLE

As reported

Section 1 is the "short title" provision, stating that the act may be cited as the "Product Liability Act."

SECTION 2—DEFINITIONS

In general

Section 2 defines terms or phrases used in the act. Whenever a defined term or phrase is used, reference should be made to the definition in section *2*.

As reported

(1) *Claimant.*[1] As used in the act, a "claimant" is any person who brings a product liability action, including the claimant's decedent if the action is brought through or on behalf of an estate. If a product liability action is brought through or on behalf of a minor, "claimant" includes the minor's parent or guardian. Following majority case law, this definition permits nonusers who are harmed by a product to bring product liability claims.

(2) *Clear and convincing evidence.* The act adopts the generally accepted definition of clear and convincing evidence.[2] This is a degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. The clear and convincing evidence standard requires more proof than the preponderance of the evidence standard and less proof than the beyond a reasonable doubt standard.

(3) *Commerce.* This definition covers the full extent of the Congress' powers to regulate and promote interstate commerce.[3]

(4) *Exercise of reasonable prudence.* The concept of reasonable prudence appears throughout the act. The concept is one with which courts have dealt for decades. The definition is based directly on section 283 of the Restatement (Second) of Torts and the accompanying comments, which refer to the "reasonable man" standard. The "reasonable man" denotes a "person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others." [4]

(5) *Express Warranty.* The definition of express warranty is based on the definition in the Uniform Commercial Code.[5] It includes any affirmation of fact, promise, or description relating to a product and may be given orally, in writing, or through any other action that communicates a material fact regarding the product's

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[1] The act does not alter, modify, change, or preempt State laws governing who may be a "claimant." For example, State statutes stating who may bring a wrongful death or survival action are not affected by the act. Such persons, if authorized by State law to bring the action, are "claimants" under the act.

[2] *See Hobson* v. *Eaton,* 399 F.2d 781 (6th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969). *See also* 30 Am. Jur. 2d *Evidence* § 1167 (1967).

[3] *See Wickard* v. *Filburn,* 317 U.S. 111 (1942).

[4] Restatement (Second) of Torts § 283, comment b (1965).

[5] Uniform Commercial Code § 2-313 (1977).

performance or condition.[6] An express warranty is not created by general statements, representations, or opinions praising the product. Such sales talk or "puff" is not an express warranty upon which reasonable persons would justifiably rely.[7] An express warranty may, however, be created without use of the words "warrant" or "guarantee" and without an intention to create an express warranty.

(6) *Harm.* The act provides that claimants may recover damages for "harms" caused by certain products. Harm includes (1) damage to property other than the product itself; (2) physical illness, injury, or death of the claimant; and (3) the claimant's mental anguish or emotional harm caused by the claimant's own physical illness or injury.

Harm does not include commercial loss. Therefore, damage to the product itself is not a compensable harm under the act. Such direct economic damage has traditionally been left to commercial or contract law, under which a purchaser has a right of action for out-of-pocket losses relating to the value of a product.[8]

Nor are indirect economic losses caused by damage to the product itself compensable harms under the act. There include, for example, loss of profits due to an inability to use the damage product. The majority case law follows *Seely* v. *White Motor Co.*[9] which leaves recovery for such losses to commercial law and the Uniform Commercial Code. These losses are, in essence, contract damages not tort damages. They arise in the course of commercial dealings and can be resolved through contracts and claims based on those contracts.

(7) *Manufacturer.* A manufacturer means any person [10] engaged in a business to design, formulate, produce, create, make, or construct any product [11] or component part, but does not include a person who only designs or formulates a product—such as an architect or engineer. These persons, although not liable under S. 44, may be liable under traditional tort law for failure to exercise reasonable skill and care in rendering their design services.[12]

A product seller [13] may be a "manufacturer" of the product he sells or otherwises places in the stream of commerce in two situa-

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[6] Whether a statement made in advertisements, product labels, product manuals, or the like creates an express warranty is a question for the trier of fact. *See, e.g., Drayton* v. *Jiffee Chemical Corp., 591 F.2d 352 (6th Cir. 1978).*

[7] *See, e.g., Hoffman* v. *A.B. Chance Co.,* 339 F. Supp. 1385 (M.D. Pa. 1972); *Jakubowski* v. *Minnesota Mining & Mfg.,* 80 N.J. Super. 184, 193 A.2d 275 (1963), *rev'd on other grounds, 42 N.J. 177, 199 A.2d 826 (1964). See also* Hoenig, "The Influence of Advertising in Products Liability Litigation", 5 Jour. Prod. Liab. 321, 329 (1982) (the statement must be more than mere "sales talk" or "puffing").

[8] *See Baltimore Football Club, Inc.* v. *Lockheed Corp.,* 525 F. Supp. 1206 (N.D. Ga. 1981); *Industrial Uniform Rental Co.* v. *Int'l Harvester Co.,* 463 A.2d 1085 (Pa. Super. 1983); *Noorman Mfg. Co.* v. *National Tank Co.,* 91 Ill.2d 69, 435 N.E.2d 443 (1982); *Superwood Corp.* v. *Siempelkamp Corp.,* 311 N.W.2d 159 (Minn. 1981).

[9] 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). *See also Jones & Laughlin Steel Corp.* v. *Johns-Manville Sales Corp.,* 626 F.2d 280 (3d Cir. 1980); *National Crane Corp.* v. *Ohio Steel Tube Co.,* 213 Neb. 782, 332 N.W.2d 39 (1983).

[10] "Person" is defined in section 2(8).

[11] "Product" is defined in section 2(11).

[12] *E.g., Mechanical Rubber & Supply Co.* v. *Caterpillar Tractor Co.,* 80 Ill. App. 3d 262, 399 N.E. 2d 722 (1980). *See also New Mexico* v. *Gathman-Matotan Architects and Planners, Inc.,* 98 N.M. 740, 653 P. 2d 166 (1982).

[13] "Product seller" is defined in section 2(12).

tions. First, he is a "manufacturer" of a product with respect to all aspects of the product that are created or affected by his own conduct in designing, or formulating and producing, creating, making, or constructing an aspect of a product made by another. Where a product seller engages in such conduct before placing the product in the stream of commerce, he is responsible for the consequences of that conduct as if he were a manufacturer.

For example, a company may manufacture a truck and deliver it to a product seller. Prior to selling that vehicle, the product seller may design and create what becomes a new aspect of the truck by, for example, adding a larger engine or a cabin unit. The product seller is, then, the manufacturer of the end product with respect to *all* aspects of the product that are affected or created by the addition. Thus, it is the manufacturer with respect to defects in the cabin unit itself and with respect to defects created by adding the unit to the original truck, such as lack of a warning back-up buzzer.[14] This rule fairly holds the product seller responsible for the consequences of his actions in designing and creating a new product from the original product.

Second, a product seller is a manufacturer of a product where he holds itself out as the manufacturer to the user of the product. Where a product seller attaches his own private label to a product made by another, the product seller's name and reputation become a representation of the product's quality in design and manufacture. The rule holding a product seller responsible for harms caused by products that he "endorses" with his private label is uniformly followed by the States.[15]

(8) *Person.* The act uses a broad definition of the term person, which includes individuals, corporations, companies, associations, firms, partnerships, societies, and any other entities. For purposes of section 12, however, the act incorporates a more narrow definition of "person".[16]

(9) *Practical technological feasibility.* This phrase is relevant to the standard by which a manufacturer's conduct in designing a product is measured. The term means the technical, medical, and scientific knowledge relating to product safety which had been developed at the time the product in question was made, was available for and capable of use in the manufacture of a product, and was economically feasible for use by a manufacturer. The phrase is consistent with the overall reasonableness standard in design cases (*see* section 5(b)) by which a manufacturer's conduct is measured. A manufacturer cannot reasonably be required to do more than was practically and technologically feasible when it designed and made the product.[17] The "practical technological feasibility" standard focuses on what reasonably should have been done and, therefore,

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[14] *See, e.g., Green* v. *City of Los Angeles,* 40 Cal. App. 3d 819, 115 Cal. Rptr. 685, 697 (1974) (seller of crane liable for harm caused by defects in the crane created by the seller's modifications; given the modifications made by the seller, it was "tantamount to a manufacturer").

[15] Restaurant (Second) of Torts § 400 (1965). *E.g., Smith* v. *Regina Mfg. Corp.,* 396 F.2d 826 (4th Cir. 1968); *Carter* v. *Joseph Bancroft & Sons Co.,* 360 F. Supp. 1103 (E.D. Pa. 1973); *Moody* v. *Sears, Roebuck & Co.,* 324 F. Supp. 844 (S.D. Ga. 1971).

[16] *See* section 12(f).

[17] *See, e.g., Lolie* v. *Ohio Brass Co.,* 502 F.2d 741, 744 (7th Cir. 1974); *Boatland of Houston, Inc.* v. *Bailey,* 609 S.W.2d 743 (Tex. 1980).

differs from an industry practice standard that focuses on what was actually being done.[18]

The "practical technological feasibility" standard is more precise than general standards by which some courts and State statutes currently measure a manufacturer's conduct regarding design.[19] As a result, it provides a clearer guideline to manufacturers and courts. Ambiguities that may be a source of litigation will be minimized.

(10) *Preponderance of the evidence.* This standard of proof is that used most often in civil litigation. It is a degree of proof which leads the trier of fact to find that a fact is more probably either true or untrue.[20]

(11) *Product.* As used in the act, a product is any object, substance, mixture, or raw material in a gaseous, liquid, or solid state which (1) is capable of delivery itself, or which is capable of delivery as an assembled whole in a mixed or combined state or as a component part or ingredient; (2) is produced for introduction into commerce; (3) has intrinsic economic value; and (4) is intended for sale or lease. Human tissue, blood, and organs are specifically excluded from the definition of "product."[21]

(12) *Product Seller.* A product seller is any person engaged in business to sell, distribute, lease, install, prepare, blend, package, label, market, repair, maintain, or otherwise place a product into the stream of commerce. The definition includes anyone in the chain of distribution, such as a wholesaler, distributor, or retailer.

A seller of real property is not a product seller under this act and, therefore, tort suits against a person who sells real property will be governed by State tort or real estate law.[22]

A person who provides professional services is not a product seller where the essence of the transaction is furnishing judgment, skill, or service and the sale or use of a product is only incidental. This follows the law of the majority of States. Where, for example, an engineer, pharmacist, optician, or physician provides or uses a product in connection with his professional services, he is not a product seller.[23] As a professional, he is required to exercise reasonable care, prudence, and skill in rendering his services. Where failure to do so results in harm, injured persons have remedies under traditional State tort law theories and do not have a claim under this act.

If, however, a professional engages in a commercial transaction where the essence of the transaction is not the furnishing of professional skill and judgment, he may be a product seller. For example,

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[18] *See Chown* v. *USM Corp.*, 297 N.W.2d 218 (Iowa 1980).

[19] *See* Colo. Rev. Stat. § 13-21-403(1) (Supp. 1981); Ky. Rev. Stat. § 411.310(2) (Supp. 1980); *Wilson* v. *Piper Aircraft Corp.*, 282 Or. 61, 577 P.2d 1322 (1978).

[20] *See* 30 Am. Jur. 2d *Evidence* § 1164 (1967); C. McCormick, "Handbook of the Law of Evidence" § 339 (2d ed. 1972).

[21] Human tissue, blood, and organs are generally used pursuant to medical treatment. Claims for harms caused by those substances are, in the view of most courts, claims for negligently performed services. Further, defects in the human body do not fit the concept of manufacturing defects and are not susceptible to design defects.

[22] *E.g.*, Restatement (Second) of Torts §§ 353, 385 (1965) (providing standards of care for builders, contractors, and sellers of real estate).

[23] *See, e.g., Carmichael* v. *Reitz*, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); *Bichler* v. *Willing*, 58 App. Div. 2d 331, 397 N.Y.S.2d 57 (1977); *Barbee* v. *Rogers*, 425 S.W.2d 342 (Tex. 1968); *Magrine* v. *Krasnica*, 94 N.J. Super. 228, 227 A.2d 539 (1967), *aff'd*, 100 N.J. Super. 223, 241 A.2d 637 (1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969).

a pharmacist who sells perfume or photographic film may be a product seller within the scope of the act. In such a case, the sale rather than the exercise of professional skill is the essence of the transaction.

A product lessor is not a product seller if (1) he acts only in a financial role in the sale or distribution of the product, and (2) he has no control over the lease arrangement. Such a person, called a "financing lessor", generally has no contact with the product and does not provide advice about the product or its selection. He merely provides the money to transfer the product to the lessee. The cases that have considered the issue uniformly hold that financing lessors are not product sellers.[24]

(13) *Product user.* This term is broad and includes any person who owns, operates, or has control of a product.

(14) *Reasonably anticipated conduct.* "Reasonably anticipated conduct," as used in the act, focuses on conduct which is expected, ordinary, and familiar, and on the class of persons likely to use or be exposed to the product. The issue is, first, what class of people use the product, and second, what conduct is expected, ordinary, and familar for those people. Conduct reasonably anticipated for products used by children differs from conduct reasonably anticipated for adults or for elderly people.

The phrase is used, for example, with respect to the manufacturer's duty to warn. Warnings, if required, must be adequate to prevent harm to product users "in the course of reasonably anticipated conduct"; warnings are not required about the consequences of product uses or alterations that do not constitute "reasonably anticipated conduct."[25] "Anticipated conduct" emphasizes what is expected, ordinary and familiar rather than what is foreseeable. Any conduct can be "foreseeable", particularly through the use of hindsight, *e.g.,* that a soda bottle will be used as a hammer, that someone will attempt to drive a land vehicle on water.[26] The act avoids the use of hindsight in evaluating a claimant's conduct, while at the same time requiring manufacturers to anticipate and guard against any reasonably expected, ordinary, and familiar conduct.

(15) *State.* This definition is broad and includes the District of Columbia, all the States, territories, and possessions of the United States, and any political subdivision thereof.

SECTION 3—PREEMPTION OF OTHER LAWS

In general

Section 3 provides that the act supersedes State law to the extent that the act establishes a rule of law for recovery of loss or damage caused by a product. When a rule of law is not established by the act, the issue is left to applicable State law.

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[24] *E.g., Nath* v. *National Equipment Leasing Corp.,* 497 Pa. 126, 439 A.2d 633, 636 (1981) ("It would be novel indeed to suggest that financing agencies should be responsible for detecting defects in the products financed. Such a result would have catastrophic impact upon commerce. . . . [The lessor's] participation in the chain of events was tangential. . . .").

[25] *See* sections 6(b)(3) and 6(e). The phrase is also used in sections 9(c) and 9(d).

[26] *E.g., American Laundry Machinery v.* Horan, 412 A.2d 407 (Md. App. 1980) (attempt to dry hot air balloon in commercial clothes dryer held foreseeable use); *Moran* v. *Faberge, Inc.,* 273 Md. 538, 332 A.2d 11 (1975) (pouring perfume on candle to scent it held foreseeable use of perfume).

Section 3 does not provide any new basis for Federal court jurisdiction. The resolution of product liability claims is left to State courts or to Federal courts that currently have jurisdiction over those claims.

Present law

Currently, product liability actions are governed by State common law or State statutes and may be based on a number of different substantive legal theories, for example, warranty, strict liability, and negligence. The availability of these multiple causes of action for a single harm creates unnecessary legal and transaction costs associated with pleading, proving, and defending each legal theory. The act seeks to eliminate these costs and to simplify the law by consolidating product liability theories into a single unified cause of action.[27]

Congress has the power under the Commerce Clause of the Constitution to enact a Federal product liability statute that preempts State law. "Any such legislation would offend neither the Tenth Amendment's recognition of state sovereignty . . . nor the Fifth Amendment's traditional notions of due process and equal protection." [28]

Jurisdiction over product liability actions rests with State courts or, where there is currently a basis for Federal jurisdiction, with Federal district courts.[29] The act does not affect these bases for jurisdiction and, therefore, does not expand the caseload of the Federal courts.

As reported

Section 3 (a) states that recovery for loss or damage caused by a product is limited to loss or damage which constitutes "harm," as defined in section 2(6). Consistent with that definition, section 3(a) states that a civil action for loss or damage to the product itself or for commercial loss is not a product liability action and is governed by applicable commercial or contract law. This follows traditional law, which leaves recovery for purely commercial losses to actions founded on commercial law.

Section 3(b) provides that the act supersedes State law regarding recovery for loss or damage caused by a product to the extent that the act establishes a rule of law applicable to an action against a manufacturer or product seller. Any issue arising in an action for loss or damage caused by a product that is not governed by a rule of law established by the act shall be governed by applicable State common and statutory law.

The act merges all legal theories on which the action may have been based prior to the effective date of the act and creates one

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[27] *See* Wade, "On Product 'Design Defects' and Their Actionability," 33 Vand. L. Rev. 551, 577 (1980) ("[W]hen the plaintiff sues on more than one of these bases, issues and instructions become so complex and complicated that even the judge and the attorneys become confused—much less the poor jury."); Uniform Product Liability Act § 102(D), Analysis, 44 Fed. Reg. 62714, 62719 (1979) (recommended by several groups). Some State statutes, like the act, define "product liability action" without regard to the legal theory on which the action is brought. *See* Neb. Rev. Stat. § 25-21, 180 (1979); N.H. Rev. Stat. Ann. § 507-D:1 (Supp. 1979); Wash. Rev. Code § 7.72.010(4) (Supp. 1982).

[28] Schmidt & Derman, "The Constitutionality of Federal Products Liability/Toxic Tort Legislation," 6 J. Prod. Liab. 171, 184 (1983).

[29] *E.g.*, 28 U.S.C. § 1332 (1976).

unified product liability cause of ation. This will eliminate the cost, delay, and confusion associated with pleading, proving, and defending a claim based on the various theories of recovery currently recognized by State law.

The act does not waive or affect the defense of sovereign immunity of any State or the United States. The act does not affect any provision of the Foreign Sovereign Immunities Act of 1976. Nothing in the act shall be construed to supersede any Federal law except the Federal Employees Compensation Act.[30]

Almost every product manufactured and sold today is a product in interstate commerce. The current climate of uncertainty in product liability law adversely affects and burdens interstate commerce. Under the Commerce Clause of the Constitution,[31] Congress has the power to enact a uniform Federal product liability act.[32] The Supremacy Clause of the United States Constitution also gives Congress the power to enact a Federal law that replaces State law in the area of product liability.[33] The fact that tort law is traditionally a matter of State law does not alter this rule. Congress has enacted a number of statutes that preempt State tort law.[34] Section 3(b) will ensure that the rules set forth in the act are uniformly applied in all product liability actions, regardless of where the harm occurred and which court hears the claim. Under the Supremacy Clause, State courts are bound to apply Federal law and to follow decisions of the Federal courts.[35] It is expected that State and Federal courts with jurisdiction over product liability actions will follow Federal precedent and will interpret the act in a manner consistent with the intent of Congress. Where the act does not establish a rule of law, State law will apply.[36] As a result of the uniform standards, the act will resolve many of the problems and ambiguities currently associated with product liability law.

Section 3(c) provides that the act does not preempt any State law creating a cause of action for damages caused by the release of a hazardous substance or waste. State law will determine what constitutes a hazardous substance or waste. These actions involve separate policy considerations and relate to acts—the mishandling of hazardous substances or wastes—that are different from the acts

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[30] For example, the provisions of the Federal Tort Claims Act 28 U.S.C. §§ 1346(b), 2671 et seq. are not affected by the act.

[31] U.S. Const. art. I, § 8, cl. 3.

[32] The Commerce Clause power extends to interstate and interstate activities which affect interstate commerce. *See e.g., Federal Energy Regulatory Comm'n* v. *Mississippi*, 102 S.Ct. 2126 (1982) (discussion of scope of Commerce Clause); *Fry* v. *United States*, 421 U.S. 542 (1976); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

[33] U.S. Const. art. VI, cl. 2.

[34] *E.g.*, Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (1978) (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C. § 2210 (1973 and Supp. 1982) (limiting liability for nuclear power plant accidents); Federal Employer's Liability Act, 45 U.S.C. §§ 51 *et seq.* (1972) (governing the liability of interstate railway carriers to their employees and altering State tort law on available defenses).

[35] *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (Federal Employers Liability Act). In addition, when there is a variance between State and Federal law, "incompatible doctrines of local law must give way to principles of federal . . . law." *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U.S. 95, 102 (1962) (National Labor Relations Act).

[36] The effect of the act on State law is the same as the effect, for example, of the Federal Employer's Liability Act on the law applied in actions involving injuries to railroad employees. 45 U.S.C. §§ 51 *et seq.* (1972). *E.g., Erie* v. *Thompson*, 337 U.S. 163, 174 (1949); *Brown* v. *Cedar Rapids & Iowa City Ry.*, 650 F.2d 159, 161 (8th Cir. 1981); *Isgett* v. *Seaboard Coast Line R. Co.*, 332 F. Supp. 1127 (D.S.C. 1971).

for which this statute provides rules of law. It is possible that a single harm may give rise both to a product liability action under this act and to an action for the release of a hazardous substance or waste. The two types of actions could be alleged as separate counts in a single complaint and may or may not be alleged against the same defendants.

Section 3(d) provides that the act does not affect in any way application of any rule of law regarding whether a claimant must identify the manufacturer of the product that caused the claimant's harm. This issue is left to State law.

Section 3(e) provides that the act does not create Federal question jurisdiction or jurisdiction based on an act of Congress regulating commerce. Parties may bring a product liability action in Federal court if the Federal forum is available to them on the basis of diversity jurisdiction.[37] Product liability cases will continue to be handled by courts currently open to the litigants. Thus, this provision will not increase the caseload of the Federal courts.

SECTION 4—RESPONSIBILITY OF MANUFACTURERS

In general

Section 4 provides that a manufacturer is liable for a harm caused by a product if the claimant establishes that (1) the product was unreasonably dangerous and (2) the unreasonably dangerous aspect of the product was a proximate cause of the claimant's harm.[38]

As reported

Section 4 sets forth the two elements of a product liability action. Both must be established by a preponderance of the evidence, which is the standard quantum of proof, in a civil case.[39]

The claimant must prove that the product is "unreasonably dangerous." A product may be unreasonably dangerous in four ways: (1) in construction or manufacture, as defined in section 5(a); (2) in design or formulation, as defined in section 5(b); (3) in the failure to provide adequate warnings or instructions, as defined in section 6; or (4) in the failure to conform to an express warranty, as defined in section 7. All product liability claims will fall into one or more of these four categories.

The claimant must also prove that the unreasonably dangerous aspect of the product was a proximate cause of the harm. Proximate cause presupposes "cause in fact" which is a purely factual inquiry. Proximate cause is generally understood to mean "legal" cause, a cause of a harm for which it is appropriate to hold the defendant legally responsible. As Dean Prosser notes, proximate cause is determined "on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent."[40]

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[37] 28 U.S.C. § 1332 (1976).

[38] *See Fenner* v. *General Motors Corp.*, 657 F.2d 647 (5th Cir. 1981). *cert. denied*, 455 U.S. 942 (1982) (proof of the defect alone is insufficient; claimant must also prove the defect caused the harm).

[39] "Preponderance of the evidence" is defined in section 2(10).

[40] W. Prosser, "Handbook of the Law of Torts," 249 (4th ed. 1971).

The act leaves to applicable State law the issue of what constitutes "proximate cause."

SECTION 5—PRODUCT CONSTRUCTION AND DESIGN

In general

Section 5 defines when a product is unreasonably dangerous in construction or manufacture and when a product is unreasonably dangerous in design or formulation. The section sets forth a standard of strict liability—liability without regard to fault—for harms caused by a product with a construction or manufacturing defect. It adopts a negligence or fault-based standard for harms caused by a product with a defective design or formulation.

Present law

Strict liability—liability without regard to fault—has long been the standard of responsibility in construction or manufacturing defect cases. As early as 1913, manufacturers of products intended for human consumption were held strictly responsible for harms caused by a product that had a construction or manufacturing defect.[41] Strict liability for construction or manufacturing defects was subsequently extended to other products.[42]

A product has a construction or manufacturing defect when it does not conform to the manufacturer's own design or specifications. A strict liability standard works in these cases, and it is fair. The product that caused the harm can be "evaluated against the manufacturer's own product standards, as manifested by other like products that roll off the assembly line." [43] If this objective comparison reveals a defect in construction or manufacture, and if the defect caused the harm, the manufacturer is liable without regard to how careful or reasonable he was in monitoring the manufacturing process and safeguarding against errors in that process.

It is reasonable for consumers to expect that products will be free from manufacturing or construction flaws. They should not have to inspect a product for defects of this type. In most instances, negligence is the cause of a construction or manufacturing defect. Nevertheless, it is very difficult for claimants to prove where in the manufacturing process or how that negligence occurred. This is the fundamental reason for the use of strict liability in these cases.

A construction or manufacturing defect generally involves a single product. A design defect, by contrast, involves an entire product line. If a particular design is found to be defective, then all of the manufacturer's products incorporating or using that design will be defective. A strict liability standard does not work well in these cases because an objective comparison of the product that caused the harm with the product that the manufacturer intended does not readily reveal whether the design is defective.

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[41] *E.g., Mazetti* v. *Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913); *Coca-Cola Bottling Works* v. *Lyons*, 145 Miss. 876, 111 So. 305 (1927).

[42] *E.g., Henningsen* v. *Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); Restatement (Second) of Torts § 402A (1965).

[43] Birnbaum, "Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence," 33 Vand. L. Rev. 593, 599 (1980), noting that Judge Traynor calls this the "deviation-from-the-norm test."

In design defect cases, the vast majority of courts apply fault-based principles and hold a manufacturer to a standard of reasonable care of prudence.[44] This is the standard that has been adopted by section 398 of the Restatement (Second) of Torts:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.

The conduct of the manufacturer is at issue in a design case, and the standard used to evaluate that conduct is whether the manufacturer acted reasonably in choosing a particular product design.[45]

While many courts speak in terms of strict liability for defective design, they actually apply fault-based principles.[46] This has led many legal scholars to note that the difference between a strict liability standard and a fault-based standard in design defect cases "is vague, uncertain, and in the final analysis, probably non-existent."[47]

For example, some courts that speak in terms of strict liability in design defect cases apply a "risk-utility" test to determine liability. However, the risk-utility test is not truly a test of strict liability, because it focuses on the judgment and conduct of the manufacturer just as a fault-based standard does. Specifically, a risk-utility analysis balances the probability and seriousness of the risk of harm against the social utility of the product and the burden on the manufacturer to avoid the risk—as judged by the reasonably prudent person. The question is whether the manufacturer acted *reasonably* in choosing a particular product design—given the probability and seriousness of the risk, the usefulness of the product, and the burden on the manufacturer to take steps to avoid the

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[44] *See generally* W. Prosser, Handbook of the Law of Torts 644 (4th ed. 1971); Birnbaum, "Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence," 33 Vand. L. Rev. 593, 599 (1980); Davison, "The Uncertain Search for a Design Defect Standard," 30 Am U. L. Rev. 643, 643 n.1 (1981); Robb, "The Effect of the Proposed Federal Product Liability Act on Current Law Regarding Liability For Defectively Designed Products," 6 J. Prod. Lia. 147, 169 (1983); Owen, "Rethinking the Policies of Strict Products Liability," 33 Vand. L. Rev. 681, 704 (1980); O'Donnell & Thomas, "Design Litigation and Strict Liability Part II: Do the Risks Outweigh the Benefits?" 5 J. Prod. Liab. 169, 270 (1982); Wade, "On Product 'Design Defects' and Their Actionability," 33 Vand. L. Rev. 551, 552 (1980); Twerski, "From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts," 60 Marq. L. Rev. 297, 304-05 (1977); Powers, "The Persistence of Fault in Products Liability," 61 Texas Law Review 777-815 (1983).

[45] *See* Birnbaum, *supra* note 44, at 600; Davison, "The Uncertain Search for a Design Defect Standard," 30 Am. U. L. Rev. 643, 643 n.1 (1981).

[46] This confusion lies in the uncertain relationship between section 398 and section 402A of the *Restatement Second of Torts*. Section 402A sets forth a strict liability rule for construction defect cases. Some commentators have argued that the strict liability standard in section 402A supersedes the fault-based standard in section 398 for design defect cases. However, this seems unlikely as none of the comments or examples in section 402A deals with design questions. *See* W. Kimble and R. O. Lesher, *Products Liability* § 133 (West's Handbook Series, 1979). Also, Dean Prosser, who was the Reporter for the Restatement, has indicated that defective design is a fault-based question: "There are, in addition, two particular areas in which the liability of the manufacturer, even though it may occasionally be called strict, appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence. One of these involves the design of the product, which includes plan, structure, choice of materials and specifications." W. Prosser, *Law of Torts*, § 996, at 644-45 (4th ed., West, 1971).

[47] W. Kimble and R. O. Lesher, *Products Liability* § 133 (West's Handbook Series, 1979).

risk. This test was first applied by Judge Learned Hand in 1947 in a *negligence* case to evaluate the conduct of a barge operator.[48] Thus, although it is sometimes labeled strict liability, a risk-utility test is inconsistent with a true strict liability standard, which would find liability regardless of the conduct or care exercised by the manufacturer.[49]

Similarly, a "consumer expectation test" of strict liability applied by some courts is, in essence, a fault-based test. It has many variants, but generally requires the trier of fact to determine what the hypothetical *ordinary* consumer would *reasonably* contemplate regarding the design of a product. Fault-based principles are inherent in the test because again, the various risk-utility factors must be balanced to determine what the ordinary consumer would reasonably contemplate.[50]

Fault-based principles are also used in strict liability cases through tests that focus on what was within practical technological feasibility. For example, a court may attempt to apply strict liability by "imputing" knowledge of the risk that caused the harm to the manufacturer. At the same time, the court will permit the manufacturer to avoid liability if he shows that it was not within "practical technological feasibility" to avoid the harm at the time the product was made.[51] To determine what was practically and technically feasible, the trier of fact must ask what the manufacturer could have done or what conduct the manufacturer should have followed. Thus, fault-based principles come back again, albeit through the back door.

Only a few courts have rejected all reliance on fault-based concepts and imposed strict liability for defective design without analyzing conduct. Two reasons are advanced to justify this departure from fault to strict liability. First, it is argued that strict liability encourages the development of safer products. Second, it is argued that the costs of product liability judgments can best be handled by distributing the costs through product prices. These arguments do not withstand analysis.

First, strict liability is not a better standard than fault—to encourage the development of safe products. When the manufacturer has acted with reasonable care in designing his product, i.e., when the manufacturer was not negligent, he has already acted with the care, attention, knowledge, and judgment society would require him to exercise to make the product safe. Indeed, the most a manufacturer can be expected to do is to exercise due care in designing his product. A standard of liability that recognizes this—a fault-based standard—will encourage safety. The application of strict liability where a manufacturer has acted with reasonable prudence may even be a disincentive to safety. As one commentator noted:

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[48] *United States* v. *Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

[49] W. Kimble and R. O. Lesher, *Products Liability* § 133 n. 20 (West's Handbook Series, 1979).

[50] *E.g. Palmer* v. *Avoc Distributing Corp.*, 82 Ill.2d 211, 216, 412 N.E.2d 959, 962 (1980); Ariz. Rev. Stat. Ann. §§ 12-61 *et seq.* (1980); 1978 Tenn. Pub. Acts, Ch. 703, § 25; *Builders Shoring & Scaffolding Equip. Co.* v. *Schmidt*, 411 So.2d 1004, 1006 (Fla. App. 1982). The "Barker Test" or "reverse burden test," adopted in several jurisdictions, also combines the "consumer expectation test" and "risk-utility" analysis. *E.g., Barker* v. *Lull Eng'g Co.*, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978); *Caterpillar Tractor Co.* v. *Beck*, 624 P.2d 790, 792 (Alaska 1981).

[51] *Phillips* v. *Kimwood Machine Co., 269 Ore. 581, 525 P.2d 1033 (1974).*

> [S]trict liability cannot be an incentive to increased research and development if the manufacturer knows that, despite whatever care it exercised in its design choice, liability will still be imposed.[52]

Second, risk distribution does not provide a reason or justification for departing from a negligence standard. As one commentator noted, risk distribution may be "explanatory of an end result . . . [but does] little to assist in making or justifying a decision to achieve that result." [53] Under a pure risk distribution rationale, a manufacturer would be liable for *every* harm caused by a product design simply because he is assumed to be in the "best" position to distribute the risks and costs of such liability. If this result is desired, the tort litigation system is not the most efficient mechanism to use. The more efficient mechanism would be a no-fault, limited damage compensation system, similar to the workers' compensation system.

As explained above, the majority of courts apply fault-based principles in determining liability in design defect cases. Despite the often used label of strict liability, the courts ultimately evaluate the conduct of the defendant and the reasonableness of that conduct. The fact that this analysis is not clearly stated is a source of confusion in the law. The confusion is exacerbated by the fact that, regardless of the label, there is no single test for evaluating a product design. The scholars have noted "[T]he courts have not adopted a universal test for analyzing a product's [design]." [54] "Strict liability left the trier of fact without a clear standard of what a 'defect' in design meant." [55] "[T]hese references to a 'defective condition unreasonably dangerous' do not give sufficient guidance to a jury confronted with a complicated design case." [56] " 'Defective' becomes . . . an expression for the legal conclusion rather than a test for reaching that conclusion." [57] One scholar described the current standard as an "I know it when I see it" standard that "will not suffice as a judicial standard for product liability." [58]

Another legal scholar stated:

> [T]he time has come for courts to stop creating obfuscatory tests that can only confuse jurors and deny litigants a consistently fair and just result. Imposing a negligence standard for design defect liability is in many cases only to define in a coherent fashion what litigants are in fact arguing and what jurors are in essence analyzing.[59]

The absence of a meaningful standard of liability for design defects is a problem for courts, juries, claimants, consumers, and

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[52] Robb, "The Effect of the Proposed Federal Product Liability Act on Current Law Regarding Liability For Defectively Designed Products," 6 J. Prod. Liab. 147, 169 (1983).

[53] Owen, "Rethinking the Policies of Strict Products Liability," 33 Vand. L. Rev. 681, 704 (1980).

[54] Davison, *Supra* note 44, at 644.

[55] Robb, *Supra* note 52, at 168.

[56] O'Donnell & Thomas, "Design Litigation and Strict Liability Part II: Do the Risks Outweigh the Benefits?" 5 J. Prod. Liab. 269, 270 (1982).

[57] Wade, "On product 'Design Defects' and Their Actionability," 33 Vand. L. Rev. 551, 552 (1980).

[58] Twerski, "From Defect to Cause to Comparative Fault—Rethinking some Product Liability Concepts," 60 Marq. L. Rev. 297, 304-05 (1977).

[59] Birnbaum, *supra* note 44, at 649.

manufacturers. For these reasons, section 5(b) establishes a fault-based standard of liability for design defect cases—a standard that in practice has always applied; a standard that will encourage the maximum possible safety; and a standard that is fair and meaningful.

As reported

Section 5(a) defines a construction or manufacturing defect that renders a product unreasonably dangerous. A product is unreasonably dangerous in construction or manufacture if, when it left the manufacturer's control, it materially deviated from (1) the design specifications, formula, or performance standards of the manufacturer, or (2) otherwise identical product units manufactured to the same specification or formula.[60]

The first facet of the definition focuses on whether the product varied from the manufactuer's design specifications, formulae, or performance standards. This is an objective test, requiring a comparison of the product that caused the harm with the product called for by the manufacturer's own specifications. Recognizing that design specifications do not exist for all products, the second facet of the definition permits an objective comparison of the product that caused the harm with otherwise identical product units made according to the intended process. The issue is whether the product is flawed as compared to the product the manufacturer intended to make. For example, a construction or manufacturing defect may be a missing piece or bolt, the use of flawed materials, or the existence of a foreign matter in the product.

There must be a "material" deviation or flaw in the product at the time it leaves the manufacturer's control. If the deviation is not "material," it will not render the product unreasonably dangerous.[61] The requirement that the deviation exist when the product leaves the manufacturer's control ensures that the deviation in fact is caused by an error in manufacturing or construction and not by an independent cause over which the manufacturer has no control.[62]

When an objective comparison reveals a construction or manufacturing defect in the product, the manufacturer is responsible for harms caused by that defective product. The fault of the manufacturer or the degree of care he used is not relevant under this strict liability standard of responsibility. The focus is on the condition or performance of the product and not on the conduct of the manufacturer.

Section 5(b) defines a design or formulation defect that renders a product unreasonably dangerous. Unlike the definition of a construction or manufacturing defect in section 5(a), this definition fo-

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[60] L. Frumer & M. Friedman, *Products Liability* § 3B-132-32.1 ("[T]he basic issue is whether the product performed as it was designed to perform, or whether it performed as other products of the same kind.")

[61] *E.g., Wiseman* v. *Goodyear Tire & Rubber Co.*, 29 Wash. App. 883, 631 P.2d 976, 979-80 (1981) ("Some products defectively manufactured are still reasonably safe for the consumer. A car with an inadequate heater is defective but not unreasonably dangerous. . . .").

[62] *See* Restatement (Second) of Torts § 402A, comment g (1965). *Cf., Hester* v. *Montgomery Elevator Co.*, 392 So.2d 155 (La. App. 1980 (defendant manufacturer not strictly liable because the product was not in its control).

cuses on whether the manufacturer acted reasonably in choosing a particular product design or in manufacturing the product at all.[63]

Section 5(b)(1) provides that a product is unreasonably dangerous in design or formulation if the claimant proves that, at the relevant point in time (1) the manufacturer knew, or through the exercise of reasonable prudence, should have known about the danger that caused the harm; and (2) a reasonably prudent person in the same or similar circumstances would not have manufactured the product or used the design or formulation that the manufacturer used.

The conduct of the manufacturer is measured against the conduct of a reasonably prudent person acting in the same or similar circumstances. As discussed in section (2)(4), the concept of the "reasonably prudent person" is well-recognized in the law of torts. According to the Restatement of Torts, it means an ordinary person "exercising the care, attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." A manufacturer must act reasonably in light of his actual knowledge about product dangers and knowledge about product dangers that in the exercise of reasonable prudence he should have had. Thus, a manufacturer is held to know about dangers that a reasonably prudent person—"a person exercising those qualities of attention, knowledge, intelligence and judgment which society requires . . . for the protection of . . . others"—would have known either through testing, keeping abreast of scientific, technical, and medical developments, or otherwise. A manufacturer is not held to know about product dangers that were unknown and that would have been unknown to a reasonably prudent person. As one scholar observed:

> Under negligence principles, the manufacturer is held to the standard of an expert in the field and therefore is *chargeable with knowing all that the circumstances reasonably dictate*. . . . Few, if any, courts would allow the imposition of liability for unknowable risks.[64]

If a manufacturer fails to act as a reasonably prudent person would have acted under the circumstances, he is liable. A manufacturer is liable for harms caused by a product that a reasonably prudent person would not have designed or manufactured.

Section 5(b)(2) provides that a product is not unreasonably dangerous in design or formulation if the defendant proves that, at the relevant point in time, (1) a means to eliminate the product danger was not within practical technological feasibility and the benefits and usefulness of the product to the public outweighed the likelihood and probable seriousness of the harm; (2) the product was "unavoidably dangerous"; or (3) the harm was caused by an inherent characteristic of the product.

First, there is no liability if, at the relevant point in time, a means to eliminate the product danger was not within practical technological feasibility[65] and the benefits and usefulness of the

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[63] *See* Restatement (Second) of Torts § 398 (1965) (manufacturers liable for a "failure to exercise reasonable care in the adoption of a safe plan or design").

[64] Hoenig, "Resolution of 'Crashworthiness' Design Claims," 55 St. John's L. Rev. 633, 661 (1981) (emphasis added).

[65] "Practical technological feasibility" is defined in section 2(9).

product to the public outweighed the likelihood and probable seriousness of the harm. If there were no other way to design the product, but nevertheless the risk of harm outweighed the product's benefits, a manufacturer cannot avoid liability under section 5(b)(1). If, however, there were no other feasible design and, on balance, the benefits of the design outweighed the risk of harm, the manufacturer's judgment or conduct in using the design or making the product will be considered appropriate.

Second, a product is not unreasonably dangerous in design or formulation if it is "unavoidably dangerous" as defined in section 5(b)(3). A product is unavoidably dangerous if, at the relevant point in time, the product (1) is useful and desirable to the public, (2) has a known but reasonable risk which, in light of the state of scientific and technical knowledge at that time, can not be made safe without impairing the effectiveness of the product's intended and ordinary use, and (3) would have been made by a reasonable manufacturer using that particular design or formulation.

This is based directly on comment k to section 402A of the *Restatement (Second) of Torts* which provides:

> The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recog nizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not [liable] for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

The principle is well-recognized in the exsiting case law.[66] The rationale is that some useful and desirable products, such as prescription drugs, even when properly prepared, are incapable of being made entirely safe for their intended and ordinary use. For example, use of the rabies vaccine and other properly prepared prescription drugs maybe accompanied by unavoidable risks of harm. Such products are, nevertheless, useful and desirable.

Third, a product is not unreasonably dangerous in design or formulation if the harm was caused by an inherent characteristic of the product that would have been recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community. This defense incorporates a principle in the *Restatement (Second) of Torts.*[67] It recognizes that some

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[66] Robb, *supra* note 55; at 167 ("The exemption from liability for . . . products which are unavoidably dangerous is recognized under all existing theories of recovery in products liability.").

[67] Restatement (Second) of Torts § 402A, comment i (1965).

products desired by consumers cannot possibly be made entirely safe. Some products have inherent characteristics that involve a risk of harm. Butter, for example, is not unreasonably dangerous in design simply because it may result in cholesterol in the arteries. Risks associated with butter, whiskey, sugar, knives, and other products are the result of inherent characteristics of the product that are "recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community".[68] This is an objective standard which focuses on what the ordinary person in the community would know, and not on what the particular claimant knew or did not know about the characteristics of the product.

Section 5(b)(4) defines the "relevant point in time" at which the manufacturer's conduct is examined in determining liability for a defect in design or formulation. The focus is generally on the time the product was manufactured. This ensures that the reasonableness of the manufacturer's conduct is not judged in hindsight with knowledge that did not exist at the time the product was manufactured.[69] It is unfair to use today's knowledge to judge the reasonableness of yesterday's conduct.

With respect to products certified by the Federal Aviation Administration (FAA), the relevant point in time is the time of certification and not the time of manufacture. The FAA must certify the design of all aircraft and must update or revise the certification as necessary to ensure safety. These updates are made, in large part, upon notification from aircraft manufacturers, operators, and maintenance personnel that a change is in order. The certificate applicable to an aircraft type is approved *before* the aircraft is manufactured. Aircraft may not deviate from the certificate that applies. If the time of manufacture were the relevant point, the trier of fact could look at design features not permitted by the certificate. For example, the trier of fact might look at design features of a different certificate that were not considered necessary for safety in the certificate applicable to the aircraft in question. This provision puts the trier of fact back in time to the point when design changes could reasonably have been made. Although the act recognizes the unique relationship between the certification process and the manufacturing process in the case of aircraft, this recognition is intended only to identify the relevant point in time with respect to which the trier of fact is to determine the reasonableness of the defendant's actions. It does not constitute a "government standards" defense.

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[68] *See* W. Prosser, "Handbook of the Law of Torts" 659 (4th ed. 1971), stating:

"There must be something wrong with the product which makes it unreasonably dangerous to those who come in contact with it. An ordinary pair of shoes does not become unreasonably unsafe merely because the soles become somewhat slippery when wet; nor is there unreasonable danger in a hammer merely because it can mash a thumb. Knives and axes would be quite useless if they did not cut."

[69] *E.g., Boatland of Houston, Inc.* v. *Bailey,* 609 S.W.2d 743 (Tex. 1980); *Chaney* v. *Whiting Corp.,* 100 Mich. App. 108, 298 N.W.2d 681 (1980).

SECTION 6—PRODUCT WARNINGS OR INSTRUCTIONS

In general

Section 6 defines when a product is unreasonably dangerous due to a manufacturer's failure to provide adequate warnings or instructions about a danger associated with the product or about the proper use of the product.

Present law

A product may be properly designed and constructed, but it may nevertheless present dangers about which a manufacturer has a duty to warn or instruct.[70] The overwhelming majority of courts applies fault-based principles in evaluating liability in cases alleging harm caused by the failure to provide adequate warnings or instructions.[71] As in design defect cases, the conduct of the manufacturer is at issue, and the standard to which a manufacturer is held is that of reasonable care or prudence. The questions are whether a manufacturer exercising reasonable care or prudence would have provided warnings or instructions about the product and if so, what warnings or instructions would have been adequate.[72]

A few courts have attempted to justify the application of strict liability—liability without regard to fault—in failure to warn cases.[73] As in design defect cases, however, a strict liability standard for failure to warn provides no guidelines to which a manufacturer can conform his conduct in order to avoid or minimize liability. When a manufacturer has acted with reasonable care in warning about a product danger, he has done everything he could reasonably do to make the product safe. A fault-based standard of liability recognizes this and encourages safety.

As reported

Section 6(a) provides that a product is unreasonably dangerous for failure of the manufacturer to provide warnings or instructions about a danger associated with the product or about the proper use of the product if (1) adequate warnings or instructions were not given, or (2) adequate postmanufacture warnings or instruction were not given A product may be unreasonably dangerous under section 6 even though it is not unreasonably dangerous in design or in construction.

Section 6(b) defines when a product is unreasonably dangerous for lack of adequate warnings or instructions. This determination requires two inquiries—whether the manufacturer had a duty to warn or instruct, and if so, whether the warnings or instructions given were adequate.

A manufacturer is liable for failure to provide adequate warnings or instructions if the claimant proves three factors, each of

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[70] *E.g., Jacobson* v. *Colorado Fuel & Iron Corp.*, 409 F.2d 1263, 1271 (9th Cir. 1969).

[71] *See* Restatement (Second) of Torts § 388 (1965); *See also Smith* v. *E.R. Squibb & Sons, Inc.*, 405 Mich. 79, 273 N.W.2d 476, 480 (1979) ("[W]hen liability turns on the adequacy of a warning, the issue is one of reasonable care, regardless of whether the theory pled is negligence, implied warranty, or strict liability in tort. . . ."); W. Prossor, Handbook of the Law of Torts 646 (4th ed. 1971) (negligence "appears to predominate" in the warning area).

[72] Restatement (Second) of Torts § 388 (1965). *See also* discussion in section 5.

[73] *Beshada* v. *Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

which is evaluated as of the time the product left the control of the manufacturer.

First, a claimant must establish that the manufacturer knew or, through the exercise of reasonable prudence, should have know about the product danger that caused the claimant' harm.[74] The focus is on what the manufacturer actually knew about the product's dangers and what the manufacturer in the exercise of reasonable prudence should have known about the product's dangers. Thus, a manufacturer is held to know that which a reasonably prudent person—a person exercising those qualities of "attention, knowledge, intelligence, and judgment which society requires . . . of its members for the protection of . . . others"—would have known either through product testing, keeping abreast of scientific, technical or medical developments, or otherwise. If the product danger is unknown to the manufacturer at the time the product left the manufacturer's control and would have been unknown to a reasonably prudent person, i.e., unknown to any person exercising reasonable prudence, there is no duty to warn about that product danger under section 6(6). If there was a duty to warn about a danger that was not and could not have been known, liability would be imposed in virtually every case alleging harm caused by the failure to warn.

Second, the claimant must show that the manufacturer failed to provide the product warnings or instructions that a reasonably prudent person would have provided. The focus is on whether there is a duty to warn, i.e., would a reasonable person have warned, and, if so, whether the warning is adequate, i.e., what kind of warning would a reasonable person give. The duty to warn and the adequacy of the warning must be determined on the facts of each case. Relevant factors that the trier of fact shall consider in determining whether there was a duty to warn include (1) the likelihood that the product would cause harm of the type alleged by the claimant and (2) the seriousness of that harm. The manufacturer's duty to warn increase as the likelihood or seriousness of the harm increases. The adequacy of the warning—the kind of warning and the clarity or conspicuousness required—also depends on the likelihood or seriousness of the harm and will vary with the circumstances of each case. If the warning is not adequate, the duty to warn has not been satisfied.

Third, the claimant must show that the warnings or instructions, if provided by the manufacturer, would have led a product user in the course of reasonably anticipated conduct to decline to use the product or to use it in a manner so as to avoid the harm. In other words, if a manufacturer has a duty to warn, then the warning must be adequate to prevent harm to product users in the course of "reasonably anticipated conduct." "Reasonably anticipated conduct" means "the conduct which is expected, ordinary and familiar of the class of persons likely to use or be exposed to the product." (*See* section 2(14)). If the class of persons likely to use or be exposed to the product is made up of children, then warnings or instructions must be adequate to prevent harm to children who use or are exposed to the product in a manner that is expected, ordinary and

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[74] *See,, e.g., Woodhill* v. *Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980).

familiar for children. Conduct that is reasonably "expected, ordinary and familiar" of a class of product users may not necessarily be conduct that is "reasonably prudent." For example, in some situations, standing on a chair may not be reasonably, prudent, but it may be reasonably expected, ordinary and familiar. Thus, manufacturers must provide warnings that are adequate to protect those whose conduct is reasonably anticipated—expected ordinary and familiar.

The tier, of fact, in effect, is put back to that prior point in time. This ensures that the reasonableness of the manufacturer's conduct is not judged in hindsight with knowledge that did not exist at the time the product left the manufacturer's control. It is unfair to use today's knowledge to judge the reasonableness of yesterday's conduct. It should be noted, however, that the manufacturer has a continuing duty to keep abreast of newly-discovered product hazards and, if a reasonable person would do so, to warn of those hazards discovered after the product leaves his control. (*See* section 6(c).)

Each of these three factors must be evaluated "at the time the product left the control of the manufacturer."

Section 6(c) defines when a product is unreasonbly dangerous for lack of adequate postmanufacture warnings or instructions. The claimant must show after the product left control of the manufacturer (1) the manufacturer knew or, through the exercise of reasonable prudence, should have known about the product danger that caused the claimant's harm, and (2) a reasonably prudent person in the same or similar circumstances would have provided postmanufacture warnings or instructions,[75] taking into consideration the likelihood and the seriousness of the harm.

Section 6(d) provides two exceptions to the general rule that, where warnings or instructions are required, they must be given to the user of the product. Warnings or instructions must be given to the person in the best position to prevent the harm. In most instances, that person is the product user. Section 6(d) recognizes the traditional situations in which warnings or instructions, as a practical matter, must be given to someone other than the product user.

First, warnings or instructions may be given to a person other than the user, including an employer, if a reasonably prudent person would have given the warnings or instructions to the third person.[76] This determination is made in light of several factors: (1) the practical and economic difficulties of giving the warnings or instructions directly to the product user; (2) the likelihood that the product would cause the harm of the type alleged by the claimant; and (3) the probable seriousness of that harm.[77] In addition, applicability of this subsection depends on whether the third person could be expected to take action to avoid the product user's harm

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[75] *See Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir. 1969), *on rehearing*, 424 F.2d 427 (2d Cir. 1970), *cert. denied*, 396 U.S. 959 (1969).

[76] *See* Restatement (Second) of Torts § 388, comment n: "Modern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do."

[77] For example, in one case it might be sufficient to affix warnings to the product because the warnings would be readily seen by the user. In another case, the manufacturer might be required to warn the user directly because a warning affixed to the product would not be readily seen. The issue is for the trier of fact to decide.

or to assure that the risk of harm is explained to the product user. Third persons to whom the warning may be given may fall into a variety of categories, such as employers or parents where the requirements of this section are met.[78]

Second, following existing case law, warnings or instructions shall be provided to an expert who uses or supervises use of a product that may be legally used only by or under the supervision of an expert, such as a prescription drug. For example, a manufacturer of a drug that can be sold and used only with the prescription of a physician has a duty to warn the physician of the risks associated with the drug. The physician may reasonably be expected to take action to avoid the harm or to explain the risk of harm to the product user. A physician's skill and expertise is needed to evaluate whether the risks outweigh the benefits of the drug to the individual product user, the patient.[79] The manufacturer must use reasonable prudence to warn or instruct the expert.

Section 6(e) provides that a product is not unreasonably dangerous for lack of warnings regarding (1) dangers that are obvious, (2) the consequences of product misuse, and (3) the consequences of product alterations or modifications.

First, there is no duty to warn about obvious dangers. Dangers that are obvious are dangers, including the magnitude of the danger, of which a product user in the course of reasonably anticipated conduct or a third party, as defined in section 6(d), would have been aware without a warning; and dangers, including the magnitude of the danger, that were a matter of common knowledge to persons in the same or similar position as the claimant.

Warnings or instructions about obvious dangers—that knives cut or that high-speed automobile races are dangerous—are unnecessary.[80] The case law recognizes that the determination of whether a danger is obvious involves an objective test: would the ordinary consumer engaging in reasonably anticipated conduct have been aware of the danger?[81] If the product is one used by trained, skilled professionals, *i.e.*, those with special or sophisticated knowledge about the product, there is no duty to warn of dangers that such users in the exercise of reasonably participated conduct would recognize.[82]

Second, there is no duty to warn about the consequences of product misuse. Section 9(c) defines misuse as use for a purpose or in a manner which is not consistent with reasonbly anticipated conduct.

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[78] *See, e.g., Wilhelm* v. *Globe Solvent Co.*, 373 A.2d 218 (Del. 1977) (no duty to warn employee where employer has knowledge); *Schmeizar* v. *Trus Joist Corp.*, 273 Or. 120, 540 P.2d 998 (1975) (contractor); *Reed* v. *Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478 (1979) (employer).

[79] *See Stanback* v. *Parke, Davis & Co.*, 502 F. Supp. 772 (W.D.Va. 1980), *aff'd*, 657 F.2d 64 (4th Cir. 1981); *Dunkin* v. *Syntex Labs., Inc.*, 443 F.Supp. 121 (W.D.Tenn. 1977); *Carmichael* v. *Reitz*, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); *Bacardi* v. *Holzman*, 82 N.J. Super. 442, 422 A.2d 617 (1981); *Terhune* v. *A.H. Robins Co.*, 90 Wash. 2d 9, 577 P.2d 975 (1978).

[80] Twerski, Weinstein, Donaher & Piehler, "The Use and Abuse of Warnings in Products Liability," 61 Cornell L. Rev. 495, 514 (1976) ("Warnings, in order to be effective, must be selective.").

[81] *E.g., Garrison* v. *Heublien, Inc.*, 673 F.2d 189 (7th Cir. 1982); *Colson* v. *Allied Prods. Corp.*, 640 F.2d 5 (5th Cir. 1981); *Brech* v. *J. C. Penny Co.*, 532 F. Supp. 916 (D.S.D. 1982); *Simpson* v. *Hurst Performance, Inc.* 437 F. Supp. 445 (M.D.N.C. 1977), *aff'd*, 599 F.2d 1351 (4th Cir. 1978); *Huff* v. *Elmhurst-Chicago Stone Co.*, 94 Ill. App. 3d 1091, 419 N.E.2d 561 (1981); *Durkee* v. *Cooper of Canada, Ltd.*, 99 Mich. App. 693, 298 N.W.2d 620 (1980); *Claytor* v. *General Motors Corp.*, 286 S.E.2d 129 (S.C. 1982).

[82] *E.g., Brown* v. *Link Belt Div. of FMC Corp.*, 666 F.2d (110 Cir. 1982); *Fierro* v. *Int'l Harvestor Co.*, 127 Cal. App. 3d 862, 179 Cal. Rptr. 923 (1982).

(*See* section 2(14). It is unreasonable to require a manufacturer to warn about the consequences of conduct that is not "expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product."[83] A product can be misused in a virtually unlimited number of ways. In hindsight, any kind of product misuse can be found to be foreseeable. A manufacturer should not be required to warn about every conceivable misuse. Rather, the duty to warn is limited to uses that are reasonably anticipated. This is in accord with section 9 which holds the product user responsible for harms caused by his own misuse of the product. (*See* section 9.)

Third, and for the same reasons, there is no duty to warn about the consequences of product alterations or modifications as those terms are defined in section 9(d).[84]

SECTION 7—PRODUCT EXPRESS WARRANTY

In general

Section 7 provides that a product is unreasonably dangerous if it does not conform to an express warranty[85] given by the manufacturer.

Present law

The majority rule, whether based on the tort law of misrepresentation or on contract law,[86] has long been that a manufacturer who extends and express warranty is strictly liable for harms caused as a result of the product's failure to conform to the warranty.[87] The "Restatement (Second) of Torts" states that a manufacturer who fails to meet his own express warranty of a material fact concerning the character or quality of a product is subject to liability for harms caused by justifiable reliance upon the express warranty—even though the warranty is not made fraudulently or negligently, and even though there is no contractual relationship with the manufacturer.[88]

Strict liability for the breach of an express warranty is fair, and it is workable. A manufacturer should be expected to meet his own representations about a product. A product user has the right to rely on a manufacturer's express warranty as true, and therefore, he should recover for harms caused by the breach of the warranty whether or not the manufacturer acted negligently. As one court stated:

> If a person states as true material facts . . . to one who relies and acts thereon to his injury, if the representations

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[83] *See, e.g., Kysor Indus. Corp.* v. *Frazier*, 642 P.2d 908 (Colo. 1982); *Curry* v. *Louis Allis Co.*, 100 Ill. App. 3d 910, 427 N.E.2d 254 (1981); *Potmesil* v. *E.I. dePont De Nemours Co.*, 408 So.2d 315 (La. App. 1981), *cert. denied*, 412 So.2d 1097 (La. 1982); *Stigler* v. *Bell*, 276 So.2d 799 (La. App. 1973); *Turner* v. *Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217, S.E.2d 863 (1975).

[84] *See Talley* v. *City Tank Corp.*, 158 Ga. App. 130, 279 S.E.2d 264 (1981); *Rodriguez* v. *Besser Co.*, 115 Ariz. 454, 565 P.2d 1315 (1977); *Westerberg* v. *School District No. 792*, 276 Minn. 1, 148 N.W.2d 312 (1967).

[85] "Express warranty" is defined in section 2(5).

[86] *See* Uniform Commercial Code § 2-313.

[87] *See* W. Prosser, "Handbook of the Law of Torts" 652 (4th ed. 1971) ("decisions to the contrary have been amazingly few").

[88] *See* Restatement (Second) of Torts § 402B (1965).

are false, it is immaterial that he did not know they were false, or that he believed them to be true.[89]

Strict liability for breach of an express warranty is workable because an objective comparison of the product that caused the harm with the product as it was warranted will reveal whether the warranty was breached.

As reported

Section 7(a) states that a product is unreasonably dangerous because it did not conform to an express warranty made by the manufacturer if (1) the product failed to conform to the express warranty and (2) the failure of the product to conform to the warranty caused the claimant's harm. The focus is on the condition or performance of the product.

Express warranty, defined in section 2(5), includes any affirmation of fact, promise, or description relating to a product. It may be given orally, in writing, or through any other action that communicates a material fact about the product's safety, performance, or condition.[90] An express warranty is not created by general statements, representations, or opinions praising the product. Such sales talk or "puff" is not an express warranty upon which persons would justifiably rely.[91] An express warranty may, however, be created without use of the words "warrant" or "guarantee" and without a specific intention to make an express warranty.

Section 7(b) states that a product may be unreasonably dangerous even when the manufacturer was not negligent or fraudulent in making the express warranty. This is consistent with majority case law holding that a manufacturer is liable for harms caused by breach of his own express warranty even when he acted reasonably, with due care, and in good faith in extending the warranty.[92]

SECTION 8—RESPONSIBILITY OF PRODUCT SELLERS

In general

Section 8 specifies when a product seller other than a manufacturer[93] is responsible for harm caused by a product. A product seller is liable for harm caused (1) by its own failure to exercise reasonable care with respect to the product; (2) by a product that fails to conform to an express warranty made by the product seller; and (3) by an unreasonably dangerous product,[94] if the manufacturer responsible is not subject to service of process or if the court

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[89] *Baxter* v. *Ford Motor Co.*, 179 Wash. 123, 35 P.2d 1090, 1092 (1934).

[90] Whether a statement made in advertisements, product labels, product manuals, or the like creates an express warranty is a question for the trier of fact. *See, e.g., Drayton* v. *Jiffee Chemical Corp.*, 591 F.2d 352 (6th Cir. 1978).

[91] *See, e.g., Hoffman* v. *A.B. Chance Co.*, 339 F. Supp. 1385 (M.D. Pa. 1972); *Jakubowski* v. *Minnesota Mining & Mfg.*, 80 N.J. Super. 184, 193 A.2d 275 (1963), *rev'd on other grounds*, 42 N.J. 177, 199 A.2d 826 (1964). *See also* Hoening, "The Influence of Advertising in Products Liability Litigation", 5 Jour. Prod. Liab. 321, 329 (1982) (the statement must be more than mere "sales talk" or "puffing").

[92] *See Hauter* v. *Zogarts* 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975); *Spiegel* v. *Saks 34th Street*, 43 Misc. 2d 1065, 252 N.Y.S.2d 852 (1964), *aff'd*, 26 App. Div. 2d 660, 272 N.Y.S.2d 972 (1966).

[93] "Product seller" is defined in section 2(12).

[94] *See* sections 4, 5, 6, and 7.

determines that the manufacturer would not be able to pay a judgment entered against him.

Present law

In a number of States, product sellers are liable for harms caused by a product as if they were manufacturers of the product. Thus, product sellers may be held responsible for product-related harms that they did not cause and over which they had no control.

Two reasons have been advanced for holding product sellers liable as if they were manufacturers. First, it has been argued that the rule promotes safety and reduces the risk of harm, because product sellers will seek to avoid liability by pressuring manufacturers to make safe products.[95] This rationale, however, fails to recognize that manufacturers will feel the same, if not greater, pressure to make safe products if they are sued directly for harms caused by their own product defects.

Second, it has been argued that the rule is fair because a product seller who is held liable for harm caused by a manufacturer's defect can seek indemnity[96] and thereby shift the cost of liability to the manufacturer who actually caused the harm.[97] Data show that, in fact, product sellers account for less then five percent of product liability payments[98] because they are successful in shifting the cost of liability to the manufacturers.

Although the end result may be fair, the system is inefficient. Product sellers are routinely sued for harms caused by a manufacturer and are forced to incur substantial legal costs both to defend the product liability law suit and to seek indemnification from the responsible manufacturer.[99] As courts have recognized, the product seller is not truly "held harmless" through indemnification if he must "expend large sums to defend a products liability action merely because a defective product, the defect of which may be attributable solely to the manufacturer's conduct, passed through [his] hands."[100] Further, indemnity does not reimburse product sellers for loss of good will or reputation caused by lawsuits.

Some cases[101] and a number of State statutes[102] have recognized the inequity of the majority rule. Section 8(a)(1) is based on

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[95] *E.g., Vandermark* v. *Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

[96] Indemnity "rests upon the equitable principle of a right to restitution." Where "the wrongful act of one results in liability being imposed on another, such other person may have indemnity from the person actually guilty of the wrong." *Minster Machine Co.* v. *Diamond Stamping Co.*, 72 Mich. App. 58, 248 N.W.2d 676, 678 (1976) (claim by manufacturers against an employer). *See also* 41 Am. Jur. 2d *Indemnity* §§ 20, 25 (1968).

[97] *See e.g., Hales* v. *Monroe*, 544 F.2d 331 (8th Cir. 1976); *Litton Systems Inc.* v. *Shaw's Sales & Service, Ltd.*, 579 P.2d 48 (Ariz. App. 1978); *Fairburn* v. *Montgomery Ward & Co.*, 349 So.2d 1280 (La. App. 1977); *Anderson* v. *Somberg*, 158 N.J. Super. 384, 386 A.2d 413 (1978).

[98] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results, 35 (1977).

[99] *E.g., Kelly* v. *Hanscom Bros., Inc.*, 231 Pa. Super. 357, 331 A.2d 737, 740 (1974). ("It is not unusual for liability to move transactionally up the chain of distribution until the manufacturer ultimately pays . . .").

[100] *Piedmont Equipment Co.* v. *Eberhard Mfg. Co.*, 665 P.2d 256, 259 (Nev. 1983) (holding that a product seller, absolved of liability in a products case, may seek indemnification from the responsible manufacturer for his legal costs).

[101] *See, e.g., Sam Shainberg Co.* v. *Barlow*, 258 So.2d 242, 246 (Miss. 1972) ("[I]t would not be reasonable, logical or practical to place on every retail merchant the absolute duty of inspecting for defects in every article . . . that the retailer might offer for sale. Such a rule of law would make each retail merchant an insurer or guarantor of every one of the thousands of items he handles merely as a sales conduit.")

[102] *E.g.*, Colo. Rev. Stat. § 13-21-402 (Supp. 1979); Idaho Code § 6-1407 (Supp. 1983); N.C. Gen. Stat. § 99B-2 (1979).

the case law and State statutes which provide that product sellers are responsible only for harms caused by their *own* wrongful conduct in handling the product. This rule recognizes that, because manufacturers ultimaty pay for harms caused by their own products, claims should be brought directly against them rather than against product sellers. In the event, however, that the manufacturer responsible for the harm is not subject to service of process by the injured claimant or would be unable to pay the judgment, the product seller should be treated as if he were the manufacturer. Under these circumstances, the claimant would have no recourse unless the product seller is held responsible as the manufacturer.[103]

This approach eliminates unnecessary and burdensome legal costs and provides incentives for product safety without affecting a claimant's ability to recover for harms caused by a product defect.

As reported

Section 8(a) identifies two situations in which a product seller other than a manufacturer is liable for harm caused by a product. Both follow the rule that a product seller is responsible for the consequences of his own conduct. This concept of individual responsibility, of placing responsibility on the party that actually caused and could have prevented the harm, encourages product safety on the part of product sellers.

First, a claimant will recover from a product seller if: (1) the product that caused the harm was sold or otherwise placed in the stream of commerce by the product seller; (2) the product seller failed to exercise reasonable prudence with respect to the product; and (3) the failure to exercise reasonable prudence was a proximate cause of the harm. Second, a claimant will recover from a product seller if (1) the product seller made an express warranty about the product independent of any express warranty made by the manufacturer; (2) the product failed to conform to the warranty; and (3) the failure to conform to the warranty caused the claimant's harm. This is a strict liability standard and is based on the same rationale discussed in section 7 with regard to express warranties given by manufacturers.

Section 8(b) sets forth factors that may be relevant in determining whether the product seller failed to exercise reasonable prudence with respect to the product. The jury may consider, among other factors, the seller's conduct with respect to the construction, inspection, or condition of the product and any failure to transmit adequate warnings or instructions. The product seller is not liable if there was no reasonable opportunity to inspect the product in a manner that would have or, in the exercise of reasonable prudence, could have revealed the product's danger. For example, a seller may not have had a reasonable opportunity to discover a product defect if the product was prepackaged [104] or if the product never

[103] *See Vandermark* v. *Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 171, 37 Cal. Rptr. 896 (1964) ("the retailer may be the only member of that enterprise reasonably available to the injured plaintiff").

[104] *See* Ky. Rev. Stat. § 411.340 (Supp. 1982); Tenn. Code § 29-28-106 (1980). *See also Brady* v. *Steyr-Daimler-Puch, A.G.*, 429 So. 2d 1348 (Fla. App. 1983) (summary judgment for distributor who shipped product in sealed container to dealer).

passed through the seller's hands (*e.g.*, a person may have held title to a product but may never have had possession of it).[105]

Section 8(c) provides that a product seller shall be treated as the product manufacturer and shall be liable for the claimant's harm as if he were the manufacturer if (1) the manufacturer is not subject to service of process under the laws of the State where the action is brought, or (2) the court determines that a judgment against the manufacturer would be unenforceable. For example, a judgment would be unenforceable if the court finds that the manufacturer is bankrupt, insolvent, or otherwise unable to pay. A claimant may recover from the product seller for harms that were caused by the manufacturer if one of these two provisions applies, and if the claimant proves that the manufacturer would have been liable under sections 4 through 7. Although section 8(c) departs from the notion of individual responsibility for harms, it ensures that a claimant can recover from the product seller if he is unable to recover from the manufacturer responsible for the harm.

Section 8 will encourage safety by placing responsibility on the party who caused and could have prevented the harm. It will reduce the unnecessary costs and inefficiencies associated with the current system. Sellers will no longer be exposed routinely to liability for harms caused by manufacturers. The legal costs of defending product liability claims and seeking indemnification will be substantially reduced. At the same time, section 8 ensures that claimants harmed by defective products may recover from product sellers if the responsible manufacturer is unavailable or judgment-proof.

SECTION 9—DETERMINATION OF RESPONSIBILITY IN A PRODUCT LIABILITY ACTION

In general

Section 9 provides that product liability claims are governed by principles of comparative responsibility. the claimant recovers from a defendant manufacturer or product seller the amount of damages for which that defendant is responsible. In addition, when the manufacturer or product seller is found under applicable state law to be jointly and severally liable with another person, he will be responsible for damages accordingly.

Section 9 promotes safety by adhering to the concept of individual responsibility. It ensures that the person responsible for causing the claimant's harm—the person in the best position to have prevented the harm—pays his proportional share of the claimant's damages.

Present law

In 1981, 39 States and Puerto Rico and the Virgin Islands had adopted by statute or case law some form of comparative responsibility.[106] Some jurisdictions have a form of *modified* comparative

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[105] *See, e.g., Kirby* v. *Rouselle Corp.*, 108 Misc. 2d 291, 437 N.Y.S.2d 512 (1981); *Canifax* v. *Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

[106] V. Schwartz, comparative Negligence § 1.1 (1974 & Cumm. Supp. 1981).

responsibility, which allows a claimant to recover damages from the defendant unless the claimant's contribution to his own harm is greater than the defendant's contribution, or greater than 50 percent.[107]

At least 11 States[108] and some Federal statutes[109] have adopted *pure* comparative responsibility. *Pure* comparative responsibility allows a claimant to recover damages from the defendant even if the claimant is responsible for the greater part of his own harm. For example, even if the claimant is found to be 99 percent responsible for his own harm and the defendant is ony one percent responsible, the claimant will still recover one percent of his total damages from the defendant. This theory is considerably more favorable to clamants than *modified* comparative responsibility.

The fairness of pure comparative responsibility is widely recognized.[110] It has been considered appropriate in product liability cases both by State legislatures[111] and courts.[112] The application of *pure* comparative responsibility principles to all product liability claims results in a sensible and fair method of compensating claimants.

As reported

Section 9(a) states the general rule that all claims brought under the act are governed by the principles of pure comparative responsibility set forth in the section. Section 9(a) specifically provides that recovery is not barred if the claimant caused or contributed to his own harm. Rather, the claimant's total damages shall be reduced by an amount proportionate to the amount of harm attributable to his conduct. This rule is considerably more favorable to claimants than the rules of contributory negligence or modified comparative responsibility, which may totally bar recovery where a claimant contributes to his harm.[113]

Section 9(b) is a *procedural* mechanism which sets forth the steps for the trier of fact to follow in determining the claimant's total damages and the responsibility for the claimant's harm attributible to all persons and causes. The court, under section 9(g), will then enter judgment against each defendant in accordance with his individual percentage of responsibility. Where a defendant is found under applicable State law to be jointly and severally liable with another person, the court will enter judgment on the basis of joint and several liability.

Section 9(b)(1) provides that the trier of fact will specify, first, the total dollar amount of damages suffered by the claimant, and second, the percentage of responsibility for the claimant's harm at-

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[107] *E.g.*, Ark. Stat. Ann. § 27-1765 (1979); Kan. Stat. Ann. § 60-258a(a) (Supp. 1983); S.D. Codified Laws Ann. § 20-9-2 (1979). *See also Sandford* v. *Chevrolet Div. of General Motors Co.*, 52 Or. App. 579, 629 P.2d 407 (1981), *aff'd*, 292 Or. 590, 642 P.2d 624 (1982).

[108] *See* Schwartz, Comparative negligence at App. A (1974 & Cumm. Supp. 1981) (citing comparative negligence systems of general application in the United States).

[109] *E.g.*, Federal Employers' Liability Act, 45 U.S.C. § 53 (1976).

[110] *E.g.*, Uniform Comparative Fault Act, § 1 and Prefatory Note, 12 U.L.A. 33 (Supp. 1982).

[111] *E.g.*, Mich. Comp. Laws Ann. § 600.2949 (Supp. 1982).

[112] *E.g.*, *Busch* v. *Busch Constr., Inc.*, 262 N.W. 2d 377 (Minn. 1977); *Daly* v. *General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

[113] Wade, "On Product 'Design Defects' and the Actionability," 33 Vand. L. Rev. 551, 577 ("Whenever plaintiff's fault contributes to his injury, the fault should not bar recovery but should diminish the amount on a proportionate basis").

tributable to the conduct of each claimant, each defendant, each third-party defendant, and any other cause or person (other than the claimant's employer or coemployee where the claimant is or would have been entitled to workers' compensation benefits). The percentages of responsibility for the claimant's harm will add up to 100 percent.

A claimant's harm that is caused by "any other person" would include, for example, harm caused by a person whom the claimant chose not to sue. Harm caused by "any other cause" would include, for example, harm attributable to an act of God (e.g., earthquake) rather than to a person.

Responsibility for harm is allocated to all persons and causes with one important exception. Evidence of conduct by the claimant's employer or coemployee is not considered in allocating responsibility if the claimant is or would have been entitled to workers' compensation benefits.[114] Under State and Federal worker compensation law, employers and coemployees can not be sued in the tort litigation system for injuries that occur in the workplace except in a few very limited situations. Immunity is granted in exchange for the payment of worker compensation benefits in cases involving workplace injury. Since employers and coemployees are immune from suit in tort, they can not be held responsible for the percentages of the claimant's harm attributable to their conduct. Allocating responsibility to employers and coemployees who can not be required to pay damages for the harm they caused would result in an unfair reduction in the claimant's award. In these cases, the percent of responsibility allocated to the defendant will include the responsibility that would otherwise be allocated to the employer or coemployee.

As discussed in section 10, the rationale for ignoring employer and coemployee responsibility in product liability cases rests on the premise that the workers' compensation system should be kept separate from the tort litigation system and that employer and coemployee immunity in tort should be respected.

Section 9(b)(2) identifies the types of conduct, defined subsections (c), (d), (e) and (f), that may be relevant in allocating percentages of responsibility. This section also states that two or more persons may be treated as a single party for purposes of allocating percentages of responsibility. These situations arise, for example, where there is a master-servant or principal-agent relationship between two persons.

Section 9(b)(3) describes how to determine the percentage of responsiblity attributable to each defendant and third-party defendant. The trier of fact will subtract from 100 percent the percentage of responsibility attributable to the claimant and to any other cause or person—other than the claimant's employer or coemployee if the claimant would be entitled to workers' compensation benefits. The trier of fact will then allocate the remaining percentage to the defendant or defendants according to their individual responsibility for the claimant's harm. However, as discussed in section 9(g), where a defendant is found to be jointly and severally

[114] Applicable workers' compensation statutes govern the determination of whether the claimant is or would have been entitled to workers' compensation benefits.

liable with another person, whether or not that other person is a party to the action, the defendant may be held responsible for his percentage of responsibility and the percentage attributable to the other person.

Section 9(c) provides that misuse of the product by a person, other than the claimant's employer or coemployee, is considered in allocating responsibility for the claimant's harm.

Misuse occurs when a product is used for a purpose or in a manner that is not consistent with the reasonably anticipated conduct of users, that is, conduct that is not consistent with conduct "which is expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product." [115] This definition of misuse is based on that in the Restatement (Second) of Torts. [116] Misuse may include use that is inconsistent with adequate warnings or instructions regarding the product. This is based on the principle, recognized by the *Restatement,* that a manufacturer or product seller has a right to assume that its adequate warnings or instructions will be followed.[117] Misuse also may include failure to train another person or otherwise provide for safe use of the product by one who would reasonably be expected to train others or to provide for safe use of the product.

Section 9(d) provides that alteration or modification of the product by a person, other than the claimant's employer or co-employee, is considered in allocating responsibility for the claimant's harm.

An alteration or modification may occur when a product is changed in a manner that is not consistent with the reasonably anticipated conduct of users, that is, not consistent with conduct "which is expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product." [118] An alteration or modification may include a change in the product design or formulation, or a change in or removal of warnings, instructions, or safety devices that accompany the product.[119] The rule regarding alteration or modification is recognized by the "Restatement (Second) of Torts" which requires proof that the product that injured the claimant had not been substantially changed.[120]

An alteration or modification of the product does not include ordinary wear and tear of the product, or a product change in accordance with the instructions, specifications, or express consent of the manufacturer or product seller. Where the manufacturer or product seller suggested or approved the alteration or modification, he is responsible for the consequences. Responsibility should not be al-

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[115] Conduct that is reasonably "expected, ordinary and familiar" of a class of product users may not necessarily be conduct that is "reasonably prudent". For example, although standing on a chair may not always be "reasonably prudent", it may be reasonably expected, ordinary and familiar in some situations and thus would not be considered "misues"; "Reasonably anticipated conduct" is defined in section 2(14); *See* discussion in section 6.

[116] Restatement (Second) of Torts § 402A, comment h (1965).

[117] *See* Restatement (Second) of Torts § 402A, comment j (1965); *Chisholm* v. *J. R. Simplot Co.,* 94 Idaho 628, 495 P.2d 113 (1972); Ariz. Rev. Stat. § 12-683(3) (1982).

[118] "Reasonably anticipated conduct" is defined in section 2(14); *See* section 6.

[119] *E.g., Hanlon* v. *Cyn'l Baton Co.,* 541 F.2d 343 (3d Cir. 1975); *McGrath* v. *Wallace Murray Corp.,* 496 F.2d 299 (10th Cir. 1974); *Kuziw* v. *Lake Engineering Co.,* 438 F. Supp. 554 (N.D. Ill. 1977); *Talley* v. *City Tank Corp.,* 158 Ga. App. 130, 279 S.E.2d 264 (1981); *DeArmond* v. *Hoover Ball & Bearing,* 86 Ill. App. 3d 1066, 408 N.E.2d 771 (1980).

[120] Restatement (Second) of Torts § 402A(1)(b) (1965).

located to the person who made the product change. This rule follows majority law.[121]

Section 9(e) defines other conduct of the claimant that is considered in allocating responsibility for the claimant's harm. The claimant's negligence, contributory negligence, or assumption of the risk may cause all or part of the harm. If so, a percentage of responsibility is allocated to the claimant. It should be noted that the claimant's negligence, contributory negligence, or assumption of the risk may reduce damages but will not totally bar recovery as it would in many States.

The claimant may be held responsible, for example, when he is injured by a defect in the product of which he was not aware but which would have been apparent, without inspection, to a reasonably prudent person.[122] This concept of contributory negligence focuses on what would have been apparent to a reasonably prudent person, not on what the claimant himself subjectively knew.[123] If a product defect is apparent, and the claimant nevertheless uses it and is harmed, he is contributorily negligent. The judgment against the defendant manufacturer or product seller will exclude the portion of damages caused by the claimant's own negligence.

In addition, the claimant may be responsible for harm caused by his own assumption of the risk.[124] Assumption of risk occurs when the claimant knew about the product's defective condition, understood that there was a risk of harm and the potential severity of that harm, and voluntarily used the product. The test here is subjective; it focuses on what the claimant himself knew and understood.[125]

Section 9(f) provides that conduct of the claimant's employer or coemployee is to be considered only on the issue of whether that conduct was a superseding cause of the claimant's harm. Thus, evidence that the employer or coemployee misused, altered, or modified the product is not admissible for purposes of allocating percentages of responsibility for the claimant's harm. (*See* section 9(b).) It is admissible only for the purpose of proving that the conduct of the employer or coemployee was the superseding cause of the harm and that the defendant is not the responsible party.

The concept of superseding cause is well-established in tort law. According to the "Restatement (Second) of Torts," a superseding cause "is an act of a third person or other force which by its intervention prevents [the defendant] from being liable for harm to another which [the defendant's] antecedent negligence is a substantial factor in bringing about." [126] A superseding cause, in effect, raises an issue of "the policy as to imposing legal responsibility."[127] As Dean Prosser explained:

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[121] *See* Uniform Product Liability Act § 112(D), Analysis, 44 Fed. Reg. 62714, 62739 (1979).

[122] *See* definition in section 2(4).

[123] *E.g., Auburn Mach. Works Co.* v. *Jones*, 36 So. 2d 1167 (Fla. 1979); *Rose* v. *Herring Tractor & Truck Co.*, 47 N.C. App. 643, 267 S.E.2d 717 (1980).

[124] *E.g., Colson* v. *Allied Prods. Corp.*, 640 F.2d 5 (5th Cir. 1981); *Moran* v. *Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974). *See also* Restatement (Second) of Torts §§ 496A, 496D, comment c (1965).

[125] Distinguishing between contributory negligence and assumption of risk, *see* W. Prosser, "Handbook of the Law of Torts" 441 (4th ed. 1971) ("[A]ssumption of risk is a matter of knowledge of the danger and intelligent acquescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable man. . . .").

[126] Restatement (Second) of Torts § 440 (1965).

[127] W. Prosser, "Handbook of the Law of Torts," § 44 at 270 (4th ed. 1971).

> The number and variety of causes which may intervene after the negligence of the defendant . . . are obviously without any limit. . . . The question is always one of whether he is to be relieved of responsibility, and his liability superseded, by the subsequent event.[128]

Because consideration of employer and coemployer conduct is explicitly barred by all other subsections of section 9 (to ensure that employer and coemployee responsibility for harm does not reduce the claimant's damages), section 9(f) is necessary to preserve the traditional rule of superseding cause with respect to employer and coemployee conduct.

Section 9(g) directs the court to enter the judgment against the defendant or defendants found responsible and specifies how the amount of that judgment is calculated. Where section 10(a) does not apply,[129] the judgment against each defendant is entered in an amount equal to the defendant's percentage of responsibility for the claimant's damages. If a defendant is jointly and severally liable with another defendant or a nonparty, the judgment is entered on the basis of joint and several liability. The judgment shall also state each defendant's individual percentage of responsibility for the claimant's harm as determined under section 9(b). Joint and several liability and contribution among joint tortfeasors is determined in accordance with State law, except that the basis for contribution is each joint tortfeasor's percentage of responsibility for the claimant's harm.

Subsection (h) provides that, within 1 year after judgment is entered, a joint tortfeasor may ask the court to determine whether all or part of the amount for which another joint tortfeasor is responsible is uncollectible through a contribution claim. If so, the court shall reallocate the uncollectible amount among the other joint tortfeasors in accordance with their respective degrees of responsibility.

The following three hypotheticals illustrate how section 9 works:

> (1) Assume that the trier of fact finds that the claimant has $100,000 total damages.[130] The trier of fact then determines that the claimant was responsible for 20 percent of his damages and that the defendant was responsible for 80 percent of the damages.[131] The trier of fact will subtract 20 percent from 100 percent and allocate to the defendant his 80 percent responsibility for the claimant's damages.[132] The court will enter judgment against the defendant in an amount equal to 80 percent of the total damages, or $80,000.[133] The claimant, in effect, bears responsibility for the $20,000 damages he him-

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[128] *Id.* at 272.

[129] Section 10(a) applies only when the claimant in a product liability action is or would be entitled to workers' compensation benefits for his harm.

[130] *See* section 9(b)(1)(A).

[131] *See* section 9(b)(1)(B).

[132] *See* section 9(b)(3)(B). If, in fact, the claimant was injured in the workplace due in part to his employer's negligence the percentage of responsibility caused by the employer will not be calculated or subtracted. Thus, where the claimant is covered by workers' compensation, the percent of responsibility allocated to the defendant will include all the responsibility that would otherwise be allocated to the employer.

[133] *See* section 9(g)(1).

self caused and collects fom the defendant the $80,000 for which he was responsible.[134]

(2) If a claimant has $100,000 total damages and defendant A is found 80 percent responsible and defendant B is 20 percent responsible, the judgments against them will be $80,000 and $20,000, respectively. If the two defendants are joint tortfeasors [135] under State law, the judgment will be entered against *each* for $100,000, with a statement that defendant A is 80 percent responsible and defendant B is 20 percent responsible. Thus, if defendant A pays the full $100,000 and the State law allows a contribution claim against defendant B, the basis for contribution by defendant B will be $20,000.

(3) Assume that the claimant obtains a $100,000 judgment against defendants A, B, and C as joint tortfeasors and the percentage of responsibility attributable to A is 50 percent; to B, 25 percent; and to C, 25 percent. If joint tortfeasor A pays the full $100,000 judgment, it has a contribution claim against B for $25,000 and against C for $25,000, i.e., in accordance with their respective percentages of responsibility. If B is unable to pay his $25,000 share to A, A may ask the court to reallocate B's uncollectible share proportionately between A and C, the other joint tortfeasor. In that event, A must bear two-thirds of the uncollectible $25,000, or $16,667, for a total of $66,667. C must contribute to A one-third of the amount uncollectible from B, or $8,333, in addition to the $25,000 for which C is individually responsible.

SECTION 10—EFFECT OF WORKERS' COMPENSATION

IN GENERAL

Section 10 clarifies the relationship between the workers' compensation system and the product liability system with rules that keep them separate, minimize legal costs, and promote safety. Section 10 eliminates the employer's subrogation lien and strengthens employer immunity from tort liability without affecting the employer's obligation to pay workers' compensation benefits. This rule provides an incentive for the employer to minimize workplace accidents and eliminates transactional costs associated with pursuing the subrogation lien. The employee—claimant obtains from the employer the workers' compensation benefits to which he is entitled and may obtain tort damages from the responsible manufacturer reduced by the amount of benefits he has been paid. Subtracting the amount of workers' compensation benefits from the product li-

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[134] If the claimant is entitled to workers' compensation benefits, the judgment against the defendant is determined under section 10(a) rather than under section 9. Section 10(a) requires, first, that the total damages be reduced by the amount of workers' compensation benefits and, second, that the defendant's percentage of responsibility be applied to the remaining amount. Assuming the claimant was entitled to $15,000 workers' compensation benefits in the above hypothetical, section 10(a) requires, first, that the claimant's total damages ($100,000) be reduced by $15,000. The judgment against the defendant would then equal its percentage (80 percent) of the remaining amount ($85,000), or $68,000. The claimant receives the full $15,000 in workers' compensation benefits and $68,000 from the defendant (which includes any amount for which the employer is responsible), for a total of $83,000, even though he himself caused $20,000 of the $100,000 damage.

[135] If a nonparty and a defendant are joint tortfeasors, the defendant's percentage of responsibility will include any percentage that would have been attributed to the nonparty.

ability judgment prevents double recovery by the employee, and, thus, serves the purpose of the subrogation lien without the associated legal costs. The manufacturer pays for the harm caused by his own conduct and the conduct of the employer or coemployee [136] less the amount of workers' compensation.

PRESENT LAW

Workers' compensation statutes are designed to ensure that an employee injured in the course of his employment has a fast and inexpensive way to recover for his injury regardless of who, if anyone, is at fault in causing the injury. The employer automatically pays workers' compensation benefits to an employee injured in the course of employment, without regard to fault. In exchange, the employer is generally immune from tort liability for the injury. Workers' compensation is usually the employee's exclusive remedy against the employer for work-related injuries.[137] In contrast, the product liability tort litigation system is traditionally fault-based and requires a manufacturer or product seller to pay for harms it has wrongfully caused.

The following are examples of efforts to shift costs between the workers' compensation and product liability systems. First, employees have been permitted in a few States to bring product liability suits against their employers. One line of cases holds the employer liable on the theory that he acted in a "dual capacity" both as the employer and as the manufacturer of the product that injured the employee.[138] The majority of courts have not accepted this rationale. Another line of cases has broadened the traditional exception to workers' compensation employer immunity that permits claims against employers for intentional torts, such as assault, battery, trespass, and false imprisonment.[139] The rationale for the exception is that employers who purposefully harm their employees should not be immune from tort liability.

Second, manufacturers have been permitted in a few States to sue employers in contribution and implied indemnity on the ground that it was the employer who caused all or part of the claimant's harm.[140] Most jurisdiction, however, respect the employer immunity concept and do not permit a manufacturer to shift the tort judgment to the employer through a contribution or indemnity action.[141]

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[136] Under section 9, the percentage of responsibility for the claimant's harm allocated to the defendant-manufacturer will always include the percentage of responsibility of the employer or coemployee in cases where the employee-claimant is entitled to workers' compensation benefits.

[137] A. Larson, 2A "The Law of Workmen's Compensation" § 65.10 (1982). *See Kofron* v. *Amoco Chem. Corp.*, 441 A.2d 226 (Del. 1982).

[138] *E.g., Bell* v. *Industrial Vangas, Inc.*, 30 Cal 3d 268, 179 Cal. Rptr. 30, 637 P.2d 266 (1981); *Mercer* v. *Uniroyal, Inc.*, 49 Ohio app. 2d 279, 361 N.E.2d 492 (1970). *Contra Provo* v. *Bunker Hill Co.*, 393 F. Supp. 778, 787 (D. Idaho 1975) ("The duty of an employer to provide safe machinery . . . does not lend itself to an interpretation that such obligation is really two legal duties.").

[139] *See Blankenship* v. *Cincinnati Milacron Chemicals, Inc.*, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982) (exposure to chemicals found to be an intentional tort); *Mandolidas* v. *Elkins Industries*, 246 S.E.2d 907 (W.Va. 1978) (willful, reckless conduct found to be an intentional tort). The *Mandolidas* decision was overruled in part by Code of W.Va. § 23.4-2 (1983).

[140] *E.g., Skinner* v. *Reed-Prentice Div.*, 70 Ill.2d 1, 374 N.E.2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978); *Lamberton* v. *Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977); *Dole* v. *Dow Chem. Co.*, 130 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972).

[141] *E.g., Hammond* v. *Kolberg Mfg. Corp.*, 542 F. Supp. 662 (D. Colo. 1982); *Glass* v. *Stahl Specialty Co.*, 97 Wash. 2d 880, 652 p.2d 948 (1982); *Union Carbide Corp.* v. *Dunn Bros. Gen. Contrac-*

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Third, in most States, an employer can recover the amount of workers' compensation benefits he pays to an injured employee through a subrogation lier, if the employee has a successful product liability claim against a manufacturer or product seller. This is done regardless of whether the employer is at Fault.

In theory, the employer receives tort immunity under the workers, compensation system in exchange for paying workers' compensation benefits.[142] However, the employer may not actually pay these benefits because he can shift these costs to the manufacturer through the subrogation lier. This shifting of costs may reduce incentives for workplace safety.

In sum, the current relationship between the workers' compensation system and the product liability system generates substantial and unnecessary legal costs, leads to unfair cost-shifting between the two systems and may reward unsafe workplace practices.

As Reported

Section 10(a) specifies how product liability judgments are calculated in actions involving claimants who are entitled to workers' compensation benefits.[143] The judgment against a defendant may be entered on the basis of joint and several liability. It further states that a court or jury determination of workers' compensation benefits shall have no binding effect on and shall not be used as evidence in any other proceeding. This will insure the integrity of the workers' compensation system.[144]

The calculation works as follows. The claimant's total damages, as determined under section 9(b)(1)(A), are reduced by the amount of workers' compensation benefits the claimant is entitled to receive.[145] The defendant's percentage of responsibility, as determined under section 9(b)(1)(B),[146] is applied to the remaining amount, and a judgment entered against the defendant in that amount.[147]

Section 10(b) eliminates the employer's subrogation lien—the right of an employer to recover from a manufacturer or his worker's compensation carrier the amount of workers' compensation benefits paid to an employee-claimant.[148] Sections 10 (a) and (b)

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tors, 294 F. Supp. 704 (M.D. tenn. 1968); *Jack Morgan Constr. Co.* v. *Larkan*, 254 ark. 838, 496 S.W.2d 431 (1973).

[142] *Id.* at 46 ("In effect, the negligent employer benefits from his wrongdoing. . . .").

[143] Claimants who are covered by workers' compensation statutes and, thus, are entitled to workers' compensation benefits should be encouraged to use the workers' compensation system.

[144] In the vast majority of cases, the workers' compensation proceeding will be completed before the product liability action. Thus, the amount of workers' compensation benefits will be determined before the judgment is reached in the product liability action. In the unlikely situation where the workers' compensation proceeding has not been initiated or completed, the court will estimate the amount of workers' compensation benefits. If, upon completion of that proceeding, the workers' compensation benefits are higher or lower than the court's estimate, the judgment will be revised accordingly.

[145] Future workers' compensation benefits that the claimant is or would have been entitled to receive must be actuarily reduced to their present value.

[146] The percentage of responsibility allocated to the defendant will always include any percentage of responsibility that might have been allocated to the employer/coemployee.

[147] In a hypothetical case, the claimant is entitled to $50,000 workers' compensation benefits and sustains total damages of $500,000. The judgment against the defendant would be $450,000, calculated as follows: $500,000 total damages less $50,000 workers' compensation benefits multiplied by 100 percent. Thus, the claimant receives a total of $500,000.

[148] For example, in the hypothetical case in note 168, *supra*, if the claimant received $50,000 in workers' compensation benefits *and* $500,000 from the defendant manufacturer, the subroga-

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will eliminate the legal and other transaction costs associated with pursuing a subrogation claim.

Section 10(c) eliminates contribution and indemnity suits by a third-party tortfeasor against the employer or coemployee of the claimant. A minority of jurisdictions allow a third-party tortfeasor, such as a manufacturer or product seller, to pursue a claim against the employer or coemployee alleging that the employer or coemployee was at fault and should pay all or part of the product liability judgment.[149] Permitting a manufacturer to sue an employer for an employee accident undermines the workers' compensation principle that the employer or coemployer should be immune from tort liability.

Under section 10(c), the manufacturer is required to pay the judgment rendered against him without shifting any part to the employer. In sum, sections 10 (b) and (c) together prohibit employers and manufacturers from suing each other to offset their liabilities. As a result, litigation costs will be reduced. All this is accomplished without affecting the interests or rights of the injured employee.

Section 10(d) states that the act is not intended to change workers' compensation laws that permit claimants to sue their employers where the harm was caused by a purposeful act of the employer. These intentional torts include, for example, assault, battery, trespass or false imprisonment.[150]

Section 10(e) excludes a State acting as an employer from the term "employer." Thus, where the employee-claimant was injured in the course of his employment by a *State*, the State retains its subrogation lien and can be sued in a contribution and indemnity action, and could be subject to a broader definition of intentional tort. This provision reflects a deference to State government and the manner in which a State has chosen to develop its workers' compensation system. A State may decide that the benefits of the subrogation lien may be outweighed by the costs of bringing subrogation claims and potential tort liability in suits by employees and third-party tortfeasors. A State may elect to follow the rule in section 10(a)–(d), by eliminating the subrogation lien in exchange for tort immunity. Such decisions are left to the individual States.

Section 10(f) provides that claimant-employees covered by the Longshoremen's and Harbor Workers' Compensation Act are not affected by section 10. That act guarantees employer tort immunity and, therefore, section 10 is not needed to keep the tort system and the workers' compensation system separate.

SECTION 11—TIME LIMITATION ON LIABILITY

In general

Section 11 sets forth a 25-year time limitation on liability, referred to as a statute of repose, for harms caused by capital goods

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tion lien would prevent double recovery of the claimant. Instead of taking home $500,000 (or $50,000 more than his total damages), the employer recoups through subrogation the $50,000 it paid. The method of calculation specified in section 10(a) will lead to the same result, but will prevent the employer from escaping his responsibility to pay workers' compensation benefits.

[149] *See* note 164, *supra*.

[150] W. Prosser, "Handbook of the Law of Torts" §§ 9, 10, 11 (4th ed. 1971).

that are allegedly unsafe in design or formulation or unsafe due to inadequate warnings or instructions. The time limitation on liability establishes the time during which a manufacturer or product seller may be held responsible for harm caused by the product. The rationale for the time limitation is that manufacturers and product sellers of capital goods, which usually have a long life, should not be exposed to liability for harms caused by these products for an unlimited period of time. A time limit on liability recognizes that claims brought long after the product was initially delivered place an unwarranted burden on trade, represent an inefficient use of judicial resources and are unfair to manufacturers, product sellers and consumers alike. The act does not establish a time limitation for noncapital goods. That issue is left to State law.

Present law

Although a manufacturer or product seller is responsible for dramatically fewer claims as a product gets older, claims may be made for a period of time well beyond the real life of the product. One recent commentary described the problems created by open ended manufacturer liability—the so-called "long tail" of liability.[151]

> First, it may be difficult to "cost in" tort liability over a period of 10, 20, 30 or more years, given the uncertainties of future economic developments with their effects on damages, to say nothing of the uncertainties of the legal standards that will be applied. Second, the manufacturers most consistently exposed to these risks are those producing capital goods, such as industrial machinery. These manufacturers sell relatively few products, and, therefore, may be less able to "pass through" the costs in the price of new machines. Third, if they do attempt to pass the costs through to customers, older producers, with liability exposure from units already in place, would be at a substantial competitive disadvantage compared to new entrants into the market. Fourth, regardless of what the law may be, there are substantial risks in trying cases involving older products. For example, there is a greater chance that the product has been subjected to a modification or misuse that the jury will say the manufacturer should have foreseen; there is also an increased risk that the jury, no matter how instructed will use a hindsight perspective rather than evaluate the product by the state of the art at the time it was produced. Finally, even if a manufacturer of an older product is able to prevail on the merits at trial, the investigation and processing of claims is an expensive procedure, and the expense is greater when witnesses and records are difficult to obtain or have long since disappeared.[152]

A number of States have recognized the adverse effects of the so-called "long-tail" of liability problem and have adopted a time limi-

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[151] Martin, "A Statute of Repose for Product Liability Claims," 50 Fordham L. Rev. 745, 749 (1982).

[152] *Id.* at 747–48 (footnote omitted).

tation for product liability actions.[153] As of January 1984, over one-third of the States had enacted statutes of repose. Most of these statutes set forth time limitations on liability between 6 and 12 years that are applicable to harms caused by all products.

Capital goods are used for a much longer period than most other products and, thus, manufacturers and product sellers may be sued 20, 30 and even 40 years after the products have been on the market. Manufacturers and product sellers are forced to defend these suits time and again even though the claimants are rarely successful.[154] Data show, however, that over 87.6 percent of payments for injuries caused by defective capital goods are paid within 12 years of the time the product was made.[155] Injuries that occur at a later point in time are usually due to ordinary wear and tear, poor maintenance, or some cause other than a defect in design or failure to warn.

Section 11 adopts a 25-year time limitation on liability applicable only to capital goods. The time period is long enough to ensure that claimants are not unfairly barred from suing for harms. The certainty provided by the time limitation will lead to savings in transaction costs and, possibly insurance costs.[156]

As reported

Section 11(a) provides that no claim alleging unsafe design or formulation[157] or failure to give adequate warnings or instructions[158] may be brought for harms caused by a capital good more than 25 years from the date that the capital good was delivered to its first purchaser or lessee who was not engaged in business to sell or lease the product or to use the product as a component part.

A "capital good" is any product or component part of any product, other than a motor vehicle, or a vessel, aircraft, or railroad used primarily to transport passengers,[159] which is both depreciable under the Internal Revenue Code of 1954, as amended, and (1) used in a trade or business, or (2) held for production of income, or (3) sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration, or for similar purposes.

The time limitation applies only to capital goods, because the "long-tail" of liability is a more serious problem for these goods, which have a substantially long life, than for most other products. Most capital goods injuries occur in the workplace.[160] Because

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[153] *Id.* at 750. A few State time limitation statutes have been held to violate State constitutional provisions that guarantee redress in court for any injury. *E.g., Lankford* v. *Sullivan, Long & Hagerty,* 416 So. 2d 996 (Ala. 1982). None have been declared unconstitutional under the United States Constitution.

[154] Statements of Emmett W. McCarthy and Herbert W. Goetz, before the Subcommittee for Consumers, March 12, 1982, Serial No. 97-109 at 112, 122-23 (1982).

[155] *See* "Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results," 230, 414 (1977).

[156] There is evidence that older claims and the fear of older claims have a "disproportionate effect" when insurance rates are established. Martin, *supra* note 151, at 756, citing Interagency Task Force on Product Liability, U.S. Department of Commerce, Final Report of the Insurance Study by McKinsey & Co. 4-92 (1977).

[157] *See* section 5(b).

[158] *See* section 6.

[159] These vehicles are not included in the definition of "capital good" and, therefore, product liability actions involving such products are not subject to the time limitation in section 11.

[160] Martin, *supra* note 1, at 757.

nearly 90 percent of the U.S. labor force is covered by workers' compensation,[161] most of those injured by a capital good after the 25-year period will recover workers' compensation benefits and, thus, will receive some compensation for their harm.

Most State time limitation statutes are considerably shorter than 25 years, averaging about 10 years.[162] Many commentators and a number of witnesses advocate a period shorter than 25 years,[163] arguing that a longer period will be ineffective in resolving the "long-tail" of liability problem. Section 11 establishes a 25-year limitation period to ensure that claimants are not unfairly barred from suing for harms caused by capital goods.

A time limitation is meaningful only if it is definite. The 25-year period specified in section 11 is measured from the date the product was delivered to the first purchaser or lessee who is not engaged in business to sell or lease the product. This period can be measured with certainty and will minimize litigation over when the period begins and ends, unlike a period that expires at the end of the common law concept of the product's "useful life." [164]

Some propose a time limitation under which harms occurring after the stated period presumptively do not give rise to an actionable harm. A presumption, however, is not a meaningful remedy for the "long-tail" of liability problem. The objectives of a time limitation on liability would not be achieved because claims for harms caused by very old products would continue to be brought with the same problems and costs. As one court said in endorsing the policy of a time limitation, people should be allowed, "after the lapse of a reasonable time, to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability. . . ." [165]

The time limitation on liability specified in section 11 applies only to cases alleging a design or formulation defect or a warning or instruction defect. It is unnecessary to extend the time limitation period to cases alleging a manufacturing or construction defect [166] or breach of express warranty [167] because these defects generally manifest themselves in a relatively short period of time.

Section 11(b) identifies three situations in which the time limitation does not apply.[168] First, the provision does not apply if the manufacturer or product seller intentionally misrepresented facts or fraudulently concealed information about the product and that conduct was a cause of the harm. Second, the time limitation does

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[161] J. Chelius, *"Workplace Safety and Health: The Role of Workers' Compensation" 20 (1977).*

[162] *E.g.*, Rev. Stat. § 25-224 (1979).

[163] *E.g.*, Interagency Task Force on Product Liability, U.S. Department of Commerce, Final Report VII-28 to 29 (1977) (recommending a 10-year period for workplace goods).

[164] Martin, *supra* note 151, at 769-70 ("[E]xpiraton of useful safe life almost always seems to be a jury question . . . [and] involves transaction costs that would seem largely to negate the possible benefits of the statute.").

[165] *Johnson* v. *Star Machinery Co.*, 530 P.2d 53, 56 (Or. 1974).

[166] *See* section 5(a).

[167] *See* section 7.

[168] Section 16 provides that if any provision of the set would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, bring an action within one year after the effective date of the act. This means that if a person is harmed by a 25-year-old capital good, and the enactment of section 11 would immediately bar his claim while applicable State law would not bar the claim, the person has 1 year from the effective date of the act within which to file his claim.

not apply if the harm was the result of the cumulative effect of prolonged exposure to a defective product. Third, the time limitation does not apply if the harm was caused within the 25-year period, but did not manifest itself until after the period expired, as in the case of a latent harm.

Section 11(c) provides that the time limitation does ot affect the right of any person to seek contribution or indemnification from the person actually responsible for the harm.[169]

SECTION 12—PUNITIVE DAMAGES

In general

Section 12 establishes a uniform standard of liability for punitive damages and provides procedures for assessing them in a product liability action.

If the defendant manufacturer or product seller is liable for compensatory damages, the claimant may request that punitive damages be assessed. If the trier of fact determines upon clear and convincing evidence that the defendant acted with reckless disregard for the safety of others, the court will determine the appropriate amount of punitive damages and will order its distribution. An amount not greater than the amount of compensatory damages may go to the claimant. The remainder would go to a person, as defined in this section to be a Government agency, nonprofit organization, or trust, for a public purpose as designated by the court. Only one punitive damage award may be made for the same allegation of reckless disregard for the safety of others.

Present law

Punitive damages punish a defendant for outrageous conduct and deter such conduct in the future by the defendant and by others.[170] They are a quasi-criminal sanction and, thus, go beyond compensating the claimant for his injuries. Punitive damages may be awarded to a claimant in civil actions in most States.[171]

Some scholars have suggested that punitive damages be abolished in tort actions, because they do not serve a compensatory purpose and because tort law does not provide the defendant with constitutional and other protections that are provided to defendants who are punished in criminal actions.[172] Some agree that punitive damages serve a useful societal purpose, because they admonish conduct that is wrongful but that may escape the attention of criminal law. It is argued, however, that it is still inappropriate

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[169] *See* Uniform Product Liability Act, § 110(B)(2)(C), 44 Fed. Reg. 62714, 62732-33 (1979).

[170] *See* Restatement (Second) of Torts § 908(1) (1965).

[171] Punitive damages are not permitted in Louisiana, *e.g., Ricard* v. *State,* 390 So. 2d 882 (La. 1980); Massachusetts, *e.g., Caperci* v. *Huntoon,* 397 F.2d 799 (1st Cir.) (dictum), *cert. denied,* 393 U.S. 940 (1968); Nebraska, *e.g., Prather* v. *Eisenmann,* 200 Neb. 1, 266 N.W.2d 766 (1978); and Washington, *e.g., Kammerer* v. *Western Gear Corp.,* 96 Wash. 2d 416, 635 P.2d 708 (1981). Other States put some limits on the allowance of punitive damages, for example, in breach of contract or wrongful death actions.

[172] *See* Uniform Product Liability Act § 120, Analysis, 44 Fed. Reg. 62714, 62748 (1979), citing Proposed Uniform State Product Liability Act § 206 (National Product Liability Council) (undated). *See also Roginsky* v. *Richardson-Merrill, Inc.,* 378 F.2d 832 (2d Cir. 1967); Fulton, "Punitive Damages in Products Liability Cases," 15 Forum 117 (1979); Coccia & Morrissey, "Punitive Damages in Products Liability Cases Should Not Be Allowed," 1978 Trial Law. Guide 46 (1978).

to provide such awards to individual claimants, who have already been fully compensated by the jury's award of actual damages.[173]

The trier of fact has total discretion over whether punitive damages should be assessed against a defendant. The standards or guidelines for determining whether a defendant should pay punitive damages are not uniform, referring variously to "willful," "wanton," "malicious," or "reckless" disregard for the rights of others.[174] A clear, uniform standard of liability will assist the trier of fact in judging the culpability of the defendant and will ensure that punitive damages are assessed properly.

The claimant must generally prove by a preponderance of the evidence that the defendant acted in a manner that warrants punishment.[175] To reflect the quasi-criminal nature of punitive damages, the act follows the rule that is emerging in States: the burden of proof is raised to clear and convincing evidence, a standard of proof closer to the criminal law standard for imposing punishment.

The trier of fact also has the discretion in most States to determine the amount of punitive damages.[176] Although the jury can estimate the appropriate amount of compensatory damages suffered by the claimant, it is in a very poor position to determine the amount of punitive damages. In assessing the culpability of a corporate defendant, as opposed to the culpability of an individual person in an ordinary case, a jury has difficulty evaluating "how much it takes" to punish a corporate defendant for decisions made in the course of business.[177] The complexity of evaluating the wealth of a large, institutional manufacturer or product seller may lead a jury to punish by assessing an amount of punitive damages that is disproportionately high or low in light of the relevant circumstances.

A partial response to these problems is the fact that some courts are exercising greater control over jury discretion with respect to the amount of punitive damages.[178] Judicial oversight after a jury award has been made and in the absence of objective standards has not been effective: evidence relevant to determining the amount of punitive damages, but wholly irrelevant to liability issues still muddies the record. For this reason, the issue of liability for punitive damages should be separated from the issue of the amount of punitive damages, leaving the first wholly to the jury and the second wholly to the court. This will prevent evidence of the de-

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[173] *See* Uniform Product Liability Act § 120, Analysis, 44 Fed. Reg. 62714, 62748-49 (1979).

[174] *See* J. Ghiardi & J. Kircher, "Punitive Damages—Law and Practice," § 5.01 at 8 (1981); Owen, "Problems In Assessing Punitive Damages Against Manufacturers of Defective Product," 49 U. Chi. L. Rev. 1, 21 (1982).

[175] Some States require proof by clear and convincing evidence, a higher standard of proof. *See Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 332, 294 N.W.2d 437, 457 (Wis. 1980); *Sabich* v. *Outboard Marine Corp.*, 60 Cal. App. 3d 591, 131 Cal. Rptr. 703 (1976); Minn. Stat. Ann. § 549.20 (Supp. 1981); Or. Rev. Stat. § 30.925 (1) (1979). *See also* Colo. Rev. Stat. § 13-25-127 (2) (1973) (proof beyond reasonable doubt).

[176] Connecticut, however, requires the court to determine the amount of punitive damages in product liability cases and limits that amount to twice the amount of compensatory damages. Conn. Gen. Stat. § 52-240b (Supp. 1981).

[177] Owen, *supra* note 174, at 44-49.

[178] *Id.* at 44 and 50, *citing Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 457 (1980); ("Judicial controls . . . will provide for fair administration of punitive damage awards in this state"); Restatement (Second) of Torts § 908, comment e (1979) ("In many States there has been a tightening of control by the appellate courts over discretion of the trier of fact."). *See also Sturm, Ruger & Co.* v. *Day, Inc.*, 594 P.2d 38 (Alaska 1979), *cert. denied*, 102 S.Ct. 391 (1981) ($2,900,000 punitive damage award excessive).

fendant's wealth, highly relevant to determining the amount of damages, from reaching the jury and being improperly used in determining whether punitive damages should be awarded.

Assuming that the defendant manufacturer acted with reckless disregard for safety, multiple suits may be brought for the resulting harms. Punitive damages may be assessed repeatedly for the same wrongful conduct and may totally bankrupt the defendant even before all compensatory claims have been resolved. Multiple, repeated "jeopardy" is, thus, a real threat to future claimants who may seek actual damages for harms caused by defective products. This was recognized recently in a case involving massive torts. There, the court held that punitive damages should not be assessed against manufacturers where a sufficient incentive for safety is provided by the award of compensatory damages.[179] S. 44 does not go this far to relieve the concern about multiple punishment. Rather, section 12 provides that punitive damages be assessed only one time for conduct alleged to constitute reckless disregard.

The matter of punishing reckless corporate conduct can be disposed of effectively and efficiently in a single proceeding. Unnecessary legal costs are associated with litigating the same allegation of reckless disregard over and over again. On the other hand, if new allegations are discovered, new cases can be brought. The court can consider a broad range of evidence relating to each allegation. In each case, the court will know that it has sole responsibility for setting an adequate punishment. This clear and unequivocal responsibility should result in full and adequate punishment. The public interest is served by disposing of the matter in a single trial with assurance that the amount of punitive damages is commensurate with the reckless conduct.

The single punitive damage assessment should benefit society generally and should not be a windfall to a claimant. A claimant who has already been paid for his actual damages has no individual right to the damages that serve the public and societal purposes of punishment and deterrence. In accord with this, section 12 provides that all or a portion of the punitive assessment should be distributed to benefit the national interest in health and safety, with the proviso that an individual claimant may receive punitive damages up to the amount of his or her compensatory damages. This gives claimants the incentive to seek punitive damages in appropriate cases. As a whole, section 12 responds to the concerns of legal scholars and commentators that:

> [T]he experience of the past several years has raised questions whether the punitive damages doctrine is being abused in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriately assessed, are sometimes unfairly large.[180]

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[179] *Jackson* v. *Johns-Manville Co.*, CCH Prod. Liab. Rptr. ¶ 10004 (5th Cir. 1984).
[180] Owen, *supra* note 174, at 59.

As reported

Section 12(a) specifies when punitive damages may be assessed against a manufacturer or product seller in a product liability action. It states that a claimant may move for punitive damages after a determination that the defendant is liable for compensatory damages and a determination of the amount of such compensatory damages. It follows the generally recognized rule that punitive damages may not be assessed in the absence of liability for compensatory damages.[181] Section 12(a) provide that nothing in this section shall be construed to permit the admission of evidence relating solely to the assessment of punitive damages in a proceeding to determine liability for and the amount of compensatory damages.

Punitive damages may be assessed if the claimant establishes by clear and convincing evidence that his harm was caused by the defendant's reckless disregard for the safety of product users, consumers, or persons who might be harmed by the product.[182] "Clear and convincing evidence" requires more proof than the "preponderance of the evidence" standard of proof traditionally used in civil actions, but it requires less proof than the "beyond a reasonable dout"[183] standard that is required for use in criminal actions. Thus, it is a standard of proof between the civil and criminal standards. This standard is appropriate for determining what is, in effect, a quasi-criminal sanction in a civil case.[184] It was proposed in the Uniform Product Liability Act and has recently been adopted by some States as the sound and fair rule.[185]

The rationale for the higher standard of proof rests on fairness. As one commentator explained:

> [A]n unjustified punitive damages award causes more harm to the defendant than erroneous failure to award punitive damages to the plaintiff. To reflect this imbalance, the burden of proof should favor the defendant more than does the "a preponderance of evidence test."[186]

A higher standard of proof is necessary to ensure that punitive damages are assessed only where appropriate.

Section 12(b) sets forth three factors[187] the trier of fact shall consider in determining whether punitive damages should be assessed. First, the trier of fact shall consider the defendant's awareness of the likelihood that serious harm would arise from the sale or manufacture of the product. Second, the trier of fact shall consider the conduct of the defendant upon discovery of the risk of harm, including steps taken to reduce the risk. For example, a defendant who acted quickly to remove a dangerous product from the market when it discovered the risk of harm is less likely to have acted with

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[181] *See* subsection (k).

[182] "Reckless disregard" is defined in section 12(j).

[183] "Clear and convincing evidence" is defined in section 2(2)."Preponderance of the evidence" is defined in section 2(10).

[184] *See* Owen, "Crashworthiness Litigation and Punitive Damages," 4 J. Prod. Liab. 221, 226 (1981).

[185] Uniform Product Liability Act § 120, 44 Fed. Reg. 62714, 62748 (1979). *See also* note 175, *supra.*

[186] Wheeler "The Constitutional Case for Reforming Punitive Damage Procedures," 69 Va. L. Rev. 269, 298 (1983).

[187] Similar factors have been adopted by statute in some States. *See, e.g.,* Minn. Stat. Ann. § 549.20(3) (Supp. 1981); Or. Rev. Stat. § 30.925 (1981).

reckless disregard. Third, the trier of fact shall consider the duration of the defendant's reckless conduct and any concealment of it by the defendant.

Section 12(c) states that if the trier of fact finds liability for punitive damages, the court shall determine the amount of damages. This approach satisfies the claimant's Seventh Amendment right by jury.

First, punitive damages are not exclusively "legal" relief within the common law purview of the jury. The award of punitive damages is a quasi-judicial function performed by the jury.[188] Second, determination of the punitive amount by the court is similar to the sentencing process in criminal actions, where it is deemed both constitutional and appropriate for the judge to determine the sentence after guilt has been determined by the jury.[189] Bifurcated trials on the issues of liability and damages are permitted in civil actions and do not implicate the right to trial by jury.[190] In light of the complexity of determining how much is enough to punish and deter a corporate defendant, a rule providing that the court determines the amount of the punitive assessment is efficient, appropriate, and fair.[191]

Section 12(c) identifies the seven factors the court shall consider in setting the amount of a punitive award: (1) All relevant evidence relating to the factors set forth in section 12(b); (2) the profitability of the conduct to the manufacturer or product seller; (3) all resolved and pending claims against the manufacturer or product seller with respect to the product; (4) the quality of the conduct that gave rise to liability for punitive damages; (5) the total resources and the condition of the business of the manufactuer or product seller; (6) the nature of the harm for which punitive damages are assessed; and (7) the total effect of other sanctions imposed upon the manufacturer or product seller as a result of the misconduct, including any criminal fines, civil penalites, or other sanctions to which the manufacturer or product seller has been or may be subjected. Factors (2) through (7) relate solely to the proper amount of the punitive assessment, and evidence solely regarding those factors is not admissible in deteremining liability for punitive damages.

Section 12(d) provides that a manufacturer or product seller may introduce evidence of postmanufacture improvements in the product in defending against a claim for punitive damages. The public policy reasons for the rule set forth in section 13, which excludes evidence of subsequence remedial measures in a product liability action, are not present here. The introduction of the evidence will not dull incentives for product safety. To the contrary, it will encourage such conduct.

Section 12(e) provides that, after the court determines the amount of punitive damages, it shall order the distribution of the

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[188] *Prince* v. *Peterson*, 538 P.2d 1325 (Utah 1975).

[189] Fed. R. Crim. P. 32. There is no Federal constitutional right to a jury determination of punishment in a criminal case. *Payne* v. *Nash*, 327 F.2d 197 (8th Cir. 1964).

[190] *See* Fed. R. Civ. P. 42(b). Bifurcated trials have been ordered in product liability cases. *E.g., Hassett* v. *Modern Maid Prods., Inc.*, 23 F.R.D. 661 (D. Md. 1959); *Nettles* v. *Gen'l Accident Fire & Assurance Corp.*, 234 F.2d 234 (5th Cir. 1956).

[191] At least one State has codified this approach in product liability cases. Conn. Gen. Stat. Ann. § 52-240(b) (Supp. 1981).

damages to the claimant in an amount it deems appropriate, provided that that amount does not exceed the amount of compensatory damages awarded to the claimant. This provision responds to the concern that the claimant should not receive a windfall in the form of punitive damages in appropriate cases.

Section 12(f) specifies how the court distributes the remaining amount of the punitive award and the rights and responsibilities of the court and the recipient. Distribution of the remainder shall be made to a person [192] to be used to further the national interest in health, safety, education, or the environment. The public purpose to which the damages are distributed may reflect the nature of the harm that the claimant suffered.

The person, as defined in this section, receiving the remainder of the punitive damages has the following fiduciary responsibilities with regard to the funds. One, the person must act in accordance with the court order governing the use of the funds. Two, the person must use the funds exclusively for the public purpose designated by the court. Three, the person must exercise the care, skill, prudence, and diligence that a reasonably prudent person in the same situation would use and must defray reasonable expenses of administering the funds. In addition, the person receiving the remainder must submit to the court an annual financial statement and opinion prepared by an independent qualified public accountant, as set forth in section 12(f)(3). The court may at any time hold a hearing and appoint an expert to examine the financial records relating to the remainder to determine whether the fiduciary duties are being met and may impose penalties or revise its distribution order if the fiduciary duties are not met, as set forth in section 12(f)(4).

Section 12(f)(6) defines "person" to be any Government agency, existing nonprofit organization, a nonprofit organization established to administer the funds, or a trust, provided that it shall not include an entity whose primary purpose is to assist in or influence the passage or defeat of legislation or to secure the election or defeat of candidates for elective office. If distribution is made to a trust, the court shall, pursuant to section 12(f)(5), designate a qualified financial institution to serve as trustee.

Section 12(g) provides that there shall be only one award of punitive damages for allegations of reckless disregard for the safety of others. This provision ensures that a manufacturer is fully and fairly punished—but punished only once—for a particular course of conduct. For example, if a manufacturer is found liable for compensatory damages for injuries caused by the defective design of its product and the claimant shows that the manufacturer acted with reckless disregard for the safety of others in designing the product, the manufacturer may be held liable for punitive damages. If the claim for punitive damages is successful, all other claims for punitive damages based on the *same* allegation of reckless disregard are barred. However, if *new* evidence in a later product liability action proves the same allegation or other allegations of reckless conduct by the manufacturer that had not been shown in the prior case, punitive damages may be awarded in that later proceeding.

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[192] "Person" for purposes of this subsection is defined in section 12(f)(6).

If an assessment of punitive damages is made and is final, other punitive damages claims based on the same allegations of reckless disregard are barred. If the assessment of punitive damages is appealed, pending claims of punitive damages are stayed. In a case where evidence relating to liability for punitive damages has begun, the case shall be stayed after the trier of fact has heard all relevant evidence of liability and determined the liability issue. If the assessment is reversed on appeal, the claims may proceed. Upon affirmance of the assessment of punitive damages, or upon assessment of the damages if no appeal is taken, all claims for punitive damages based on the same allegations are barred.

Section 12(h) permits a claim for punitive damages to be compromised *after* the trier of fact has begun to take evidence relating to liability for those damages.[193] The court must approve the compromise. Approval by the court bars other claims based on that allegation. The court shall not approve the compromise if it finds that the compromise is not in the public interest or is not commensurate with the gravity and nature of the defendant's conduct, or if there is insufficient evidence to support such a finding. This ensures that settlements are made in good faith and that the purposes of punitive damages are not circumvented. In appropriate cases, the compromise has the same effect as a punitive assessment made by the court under section 12.

Section 12(i) states that section 12 applies to all product liability actions in which no jury has been selected or, if the action is to be tried without a jury, in which the court has not begun to take evidence on the effective date of the act. Where the trials have already begun, claims for punitive damages are not affected by this act. In addition, a payment of or a determination of liability for punitive damages prior to the effective date of this act will not bar a proceeding under section 12 for punitive damages. The court shall, however, consider the total amount of punitive damages previously paid when determining the appropriate assessment under section 12(c).

Section 12(j) defines "reckless disregard." The claimant must establish that his harm was the result of the manufactuerer's or product seller's reckless disregard for the safety of product users, consumers, or those who might be harmed by the product. Reckless disregard is "conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice". This makes clear that a mere negligent choice among alternative designs or warnings does not constitute a reckless disregard for safety.

Section 12(k) addresses an issue that is unique to the wrongful death law of a few States. It relates to wrongful death product liability actions where applicable State law provides, or has been construed to provide, that only punitive damages are recoverable.[194] In these unique situtations, punitive damages are a substi-

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[193] Settlement of a product liability case *before* the jury has begun to hear evidence of punitive conduct will *not* consititute a settlement or compromise of punitive damages and, therefore, will not bar future claims for punitive damages. This ensures that there are no "races to the courthouse" and no bad faith, collusive agreements that bar punitive claims.

[194] *See* Ala. Code § 6-5-410.

tute for compensatory awards. In such situations, a defendant is liable for punitive damages regardless of whether a claim is asserted under section 12. Further, recovery of damages in such an action shall not bar a claim under this section.[195]

SECTION 13—SUBSEQUENT REMEDIAL MEASURES

In general

Section 13 states the rule, followed by most courts, that evidence of a repair or improvement in the safety of a product after the time when the harm occurred is not admissible against the manufacturer when offered to prove that the product in question was defective.

Present law

Rule 407 of the Federal Rules of Evidence, which incorporates the exclusionary rule, states that evidence of remedial measures taken after an event occurs is not admissible to prove negligent or culpable conduct in connection with that event.[196] The rationale for the exclusion is that this evidence is not relevant to the issue of liability, because liability should be judged at the time the event occurred rather than at a subsequent point in time. Evidence of a subsequent measure, if admitted, may lead a jury to infer wrongful conduct from the fact that a remedial measure was taken after the event occurred. Remedial action and improvements in product safety should be encouraged. A rule that permits evidence of subsequent remedial measures to be introduced in a product liability action involving an older product may deter manufacturers and product sellers from taking such measures by creating the legitimate fear that the introduction of the evidence would have an adverse impact on them in litigation involving the product.[197] A majority of States[198] follow the exclusionary rule by statute[199] or case law.[200] Where liability is based on fault—as in the case of design or warning defects—evidence of subsequent remedial measures is irrelevant.

A few jurisdictions have refused to apply Rule 407 in strict liability cases.[201] These courts generally reason that evidence of a subsequent remedial measure is inadmissible under Rule 407 only where used to prove "negligent or culpable conduct" and that, because strict liability does not focus on such conduct, the evidence is

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[195] *Cf.*, Federal Tort Claims Act, 28 U.S.C. § 2674 (1976).

[196] Fed. R. Evid. 407.

[197] Subsequent remedial measures may be made for a variety of reasons and, therefore, the act of improving the product is not an admission of liability; *See generally* 2 J. Wigmore, *Evidence* § 283 (Chadbourn rev. 1979); C. McCormick, "Handbook of the Law or Evidence" § 275 (2d ed. 1972); *See also, Terre Haute and I.R. Co.* v. *Clem*, 123 Ind. 15, 23 N.E. 965, 966 (1890) ("[I]t is what occurs prior to the action, and not what happens afterwards, that determines whether there has or has not been a culpable breach of duty."); *Werner* v. *Upjohn Co.*, 628 F.2d 848, 856–7 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

[198] *See* J. Weinstein and M. Berger, 2 *Weinstein's Evidence* § 407[01] (1981).

[199] *E.g.*, Ariz. Rev. Stat. Ann., Rules of Evidence, Rule 407 (1977); Mich. Rules of Evidence, Rule 407 (1978).

[200] *E.g., Shegda* v. *Hartford-Conn. Trust Co.*, 131 Conn. 186 38 A.2d 668 (1944); *Long* v. *Joestlein*, 193 Md. 211, 66 A.2d 407 (1949).

[201] *See. e.g., Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322 (10th Cir. 1983); *Unterburger* v. *Snow Co.*, 630 F.2d 599 (8th Cir. 1980); *Robbins* v. *Farmer's Union Grain Terminal Assoc.*, 552 F.2d 788 (8th Cir. 1977). *See generally* Note, "The Admissibility of Subsequent Remedial Measures in Strict Liability Actions," 39 Wash. & Lee L. Rev. 1415 (1972).

admissible in strict liability actions. However, recent decisions view the words "negligent or culpable conduct" as referring to the concept of *liability* in general and not as a basis for carving out an exception for strict liability actions.[202] The policy for excluding subsequent remedial measures—to encourage safety—should apply uniformly in all product liability actions.

As reported

Section 13(a) states the general rule that evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur, is not admissible. This provision does not refer to negligence or culpability, as does Rule 407, and, therefore, avoids the issue raised in the cases that distinguish strict liability actions from negligence-based actions when applying the rule.

Section 13(b) states the exception to the general exclusionary rule. Where a defendant's witness expressly denies the feasibility of incorporating a remedial measure in a product design or formulation, evidence of a subsequent remedial measure actually taken by the defendant may be admitted to impeach the witness. This exception closely parallels the feasibility exception in Rule 407 and in the case law.[203]

SECTION 14—STATUTE OF LIMITATIONS

In general

Section 14 provides a 2-year statute of limitations for all actions arising under the act that begins to run when the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. This provision will ensure that a claim is not barred before the claimant knows or has reason to know about his harm. A uniform statute of limitations for product liability actions will benefit injured persons whose rights to sue will no longer depend on which State statute happens to apply to their claim.

Present law

All States have statutes of limitations that have been applied to product liability actions.[204] A statute of limitations specified the time within which the claimant must file his action. Failure to file within the specified time bars the claim. The purpose of a statute of limitations is to encourage the prompt filing and resolution of claims.[205] Both the parties and the courts benefit from the prompt filing of claims, which guards against the loss of evidence or the use of "stale" evidence.

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[202] *See, e.g., Grenada Steel Industries, Inc.* v. *Alabama Oxygen Co.*, 695 F.2d 883 (5th Cir. 1983); *Cann* v. *Ford Motor Co.* 658 F.2d 54 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 2036 (1982); *Werner* v. *Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

[203] *See, e.g., Siruta* v. *Hesston Corp.* 232 Kan. 654, 659 P.2d 799 (1983).

[204] Under present law, different statutes of limitations apply in product liability actions depending upon the particular theory of the case. For example, a statute of limitations applicable in tort may be the rule in an action based on negligence while a statute of limitations applicable in contract may be the rule in an action based on breach of warranty. The act will establish one statute of limitations for all product liability actions.

[205] *See Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945).

In most States, the statute of limitations period begins to run at the "time of injury". When the injury is immediate and traumatic, this date is easy to determine. The claimant generally knows of his harm and the cause of the harm at the time of the injury. However, where the harm has a latency period or where the harm becomes manifest only after repeated exposure to the product, the claimant may not know immediately of his harm or its cause. In these situations, a "time of injury" statute of limitations may expire and bar a claim before the claimant even knows he has been harmed.

In response to this problem, some courts and State legislatures have adopted a rule under which the limitations period begins to run when the claimant discovers his harm.[206] Even this rule may be unfair, however, because the claimant may not discover the actual *cause* of his harm until some time after he discovers the harm itself. The statute of limitations may expire before the claimant can reasonably discover both his harm and its cause.[207]

A growing number of courts and State legislatures have addressed this problem by adopting a statute of limitations that does not expire until the claimant discovers both his harm and the cause of the harm.[208] The Committee believes that this rule is the better reasoned approach and that it strikes a fair balance between the interests of the parties.

As reported

Section 14 provides that in any civil action brought under the act, the complaint must be filed within 2 years of the time the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. Actions filed more than 2 years after the harm and its cause were or should have been discovered are barred.

If a person with a product liability claim has a legal disability—for example, the person is a minor or is insane—he may file his complaint any time until 2 years after the legal disability ceases. If the filing of a product liability complaint is stayed or enjoined by court order, the running of the 2-year period of limitations is suspended until the stay or injunction is lifted or ceases.

SECTION 15—SEPARABILITY CLAUSE

As reported

Section 15 provides that if any provision of the act or its application to any person or circumstance is held invalid, the invalidation shall be confined to the particular provision or to the particular person or circumstance. The remainder of the act and the applica-

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[206] *E.g., Hansen* v. *A.H. Robins Co.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983); *Hines* v. *Tenneco Chemicals, Inc.*, 546 F. Supp. 1229 (S.D. Tex. 1982).

[207] As one judge said, this follows the logic of "topsy-turvy land" where one can "be divorced before [he] ever marr[ies], or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad." *Dincher* v. *Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J. dissenting).

[208] *E.g., Williams* v. *Borden, Inc.*, 637 F.2d 731, 734 (10th Cir. 1980); Nelson v. *A.H. Robins Co.*, 515 F.Supp. 623 (N.D. Cal. 1981); *Lundy* v. *Union Carbide Corp.*, 695 F.2d 394 (9th Cir. 1982); *Fidler* v. *Eastman Kodak Co.*, 555 F. Supp. 87 (D. Mass. 1982); *Olsen* v. *Bell Telephone Laboratories, Inc.*, 388 Mass., (171,445 N.E.2d 609 (1983)).

tion of the provision to any other person or circumstance shall not be affected.

SECTION 16—EFFECTIVE DATE

As reported

Section 16(a) provides that the act shall be effective 60 days after enacted and shall apply to all product liability actions commenced on or after that date, even though the harm or conduct causing the harm occurred before the effective date. Applying the statute to all claims filed after the effective date, regardless of when the harm occurred, allows all parties and courts to know precisely what law applies in a product liability action.

Section 16(b) provides that if any provision of the act would shorten the period during which manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, bring an action within one year after the effective date of the act. This exception is intended to prevent unfair situations from arising as a result of the application of the time limitations set forth in section 11 and section 14.

SECTION 17—PRODUCT LIABILITY REVIEW PANEL

In general

Section 17 directs the U.S. Judicial Conference to establish a three-member Product Liability Review Panel to conduct an ongoing review of the adequacy of legal remedies available to persons injured by products, and to report its findings and recommendations to Congress on a biannual basis. In providing for the establishment of this Panel, it is the Committee's intent to provide a mechanism to insure the continued adaptability of tort law to new and unusual situations.

In addition to its general review function, the Panel is required to submit two special reports to Congress: (1) Within 18 months of enactment, the Panel is to recommend Federal legislation to provide compensation to victims where the manufacturer of the product cannot be identified (for example, as can be the case with generic products, such as pharmaceuticals), and in situations involving latent defects, where the manufacturer cannot be held liable for negligence because he could not have known of the danger at the time the product was manufactured; and (2) within 2 years of enactment, the Panel is to make recommendations regarding legislative or other actions to provide compensation to persons injured by products without regard to fault.

Members of the Panel would be chosen on the basis of their expertise, and would be compensated for each day during which they are engaged in the actual performance of Panel duties at the daily equivalent of GS–18 civil service wage.

Present law

Under the act, uniform product liability rules will replace the current confusion in this area of law and will help reduce unnecessary legal and transaction costs. However, some commentators,

pointing to the flexibility of the common law to respond to new situations, have expressed concern that, with codification, this area of tort law might lose some of its adaptability. One purpose of the Panel will be to insure the continued growth of product liability law to serve the ends of justice in a changing society.

Moreover, as the hearings before the Committee have demonstrated, current law, in general, does not provide recovery for claimants who bring claims against totally innocent manufacturers alleging harms caused by design or warning defects.[209] There is uncertainty about whether these claimants should be compensated only outside the tort litigation system, or within the system. The hearings also demonstrated the growing confusion in the law about how to handle the situation where an innocent person harmed by a product is unable to identify the manufacturer of that product. Some argue that it is inappropriate to handle this problem through the tort litigation system.[210] S. 44 does not address the issue but leaves the matter to State law. The Panel is to study and make recommendations regarding Federal legislation to assure that injured persons do not go uncompensated.

As reported

Section 17(a) provides that the Judicial Conference of the United States shall establish a Product Liability Review Panel to conduct studies required by this section. The Panel of three individuals shall be selected on the basis of their expertise regarding civil actions and recovery for loss or damage caused by products. By focusing on the expertise of the individuals, the Committee intends that the Panel be comprised of legal scholars, representing the very best thinkers in the field, selected without regard to political viewpoint.

Section 17(b) directs the Panel to study the need for Federal legislation to provide damages, compensation, or benefits to claimants who are unable to recover in a tort action for one of two reasons. First, the study shall examine the need for Federal legislation for those who, through no fault of their own, have been harmed by a product and are unable to recover in tort because the manufacturer of the product did not know and could not in the exercise of reasonable prudence have known at the relevant point in time about the danger that caused the harm.

Second, the study shall examine the need for Federal legislation for those who, through no fault of their own, have been harmed by a product that was unreasonably dangerous and are unable to recover in the tort system because the responsible manufacturer cannot be identified.

The results of this study required by section 17(b) are to be submitted to Congress for its consideration within 18 months after the enactment of this act. It is expected that the Panel, in assessing the need for Federal legislation to deal with each of these situations, will also assess the form and substance that legislation could

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[209] Statement of David I. Greenberg, Consumer Federation of America, before the Subcommittee for Consumers, June 30, 1982, Serial No. 97-109 at 269 (1982).

[210] Statement of John Fleming, Professor, University of California School of Law, before the Subcommittee for Consumers, March 9, 1982, Serial No. 97-109 at 70-74 (1982).

take, and make specific recommendations regarding the form and substance of any legislation it may recommend.

Section 17(c) requires the Panel to study the feasibility or availability, or both, of providing compensation without regard to fault to claimants for any loss or damage caused by a product. The study shall assess alternative compensation schemes proposed or undertaken by Federal and State governments. It is to be submitted to Congress within two years of the enactment of this act.

Section 17(d) requires the Panel to conduct an ongoing review of the adequacy of existing common law and statutory remedies in providing recovery for any loss or damage caused by a product. This study shall evaluate the adequacy and availability of existing remedies; the nature of substantive, procedural and evidentiary barriers to recovery; the scope of liability for loss or damage caused by products under present law; and the consequences, including insurability, of making changes in the law. The results of this review shall be submitted at such times as the Panel considers appropriate, but in no event less often than the 15th day of each year in which the first session of Congress occurs.

Section 17(e) indicates that members of the Panel are to be paid for their services. Panel members who are not officers or employees of the Federal Government shall be paid at a rate that does not exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–18 of the General Schedule for each day during which the member is engaged in the actual performance of the duties of the Panel. This is the customary compensation for such boards. (For example, the Toxicological Advisory Board created in the Federal Hazardous Substances Act, and the Chronic Hazard Advisory Panel created pursuant to the Consumer Product Safety Act.)

Section 17(f) authorizes the appropriation of funds to compensate Panel members.

SECTION 18—REVIEWABILITY

As reported

Section 18 states Congress' intent that, in other than exceptional cases, the U.S. Supreme Court shall not review issues in cases arising under the act that relate solely to the sufficiency of evidence and that have been finally decided by the highest court of any State.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following record votes during its consideration of S. 44:

On motion of Senator Danforth to amend S. 44 to include section relating to a Product Liability Review Panel:

YEAS—13	NAYS—2
Mr. Packwood	Mr. Hollings
Mr. Goldwater [1]	Mr. Riegle [1]
Mr. Danforth	
Mrs. Kassebaum [1]	
Mr. Pressler	

Mr. Gorton
Mr. Stevens [1]
Mr. Kasten
Mr. Trible
Mr. Long [1]
Mr. Exon
Mr. Heflin
Mr. Lautenberg

[1] By proxy.

On motion to report S. 44 with amendments:

YEAS—11

Mr. Goldwater [1]
Mr. Danforth
Mrs. Kassebaum [1]
Mr. Pressler
Mr. Gorton
Mr. Stevens [1]
Mr. Kasten
Mr. Trible
Mr. Long [1]
Mr. Inouye [1]
Mr. Exon

[1] By proxy.

NAYS—5

Mr. Packwood
Mr. Hollings
Mr. Riegle [1]
Mr. Heflin
Mr. Lautenberg

PRESENT—1

Mr. Ford

Changes in Existing Law

In accordance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported will make no change to existing law.

ADDITIONAL VIEWS OF MR. GORTON

The Product Liability bill which the Senate Commerce Committee has reported to the floor this session, is one that is quite different from the bill originally introduced in the 97th Congress. S. 44, as reported, reflects an evolutionary process which is both necessary and appropriate in an area as complex in substance and procedure as is the field of product liability law.

Senator Kasten has been most willing to work with those of his colleagues who have specific criticisms and suggestions with respect to the bill. In particular, I appreciate his effort in responding to many of my concerns upon which my continued support for the development of such a uniform proposal was grounded.

In my view, the utility of continuing to examine and modify the bill at the Committee level during the remaining days of this Congress would be limited. It is time that those of our colleagues who are not members of the Commerce Committee be given the opportunity to examine the bill and the issues it tries to address and to suggest improvements to it. Although I have been an unwavering believer in the need for a uniform product liability law, I am just as confident that any bill which seeks, as does this bill, to transform fundamentally a traditional State-Federal relationship, deserves the fullest and fairest scrutiny the legislative process can provide. For once we act to preempt State product liability law as comprehensively as would S. 44, it will be nearly impossible to reverse our action.

For that reason, the bill once passed, must be both fair and procedurally feasible. S. 44, as reported, is substantially better balanced than previous drafts have been. In many respects, some of the continued areas of conflict are ones in which the parties agree on what the public policy ought to be, but disagree as to whether the language of the bill accurately reflects that policy. In this respect, I encourage interested parties to continue discussions on particular language in the bill to ensure that congressional intent will not be misunderstood by attoneys, judges and/or juries.

Moreover, although in my view the case has been made for holding the manufacturer to some sort of a fault-based standard for a design defect in the manufacturer's product or for a failure to warn or instruct with respect to the use of the product, an equally good case has been made that Congress should not simply abandon innocent product users who have been injured by products which are dangerous to an extent that exceeds the consumer's reasonable expectations but in the manufacture of which there was no fault by the manufacturer. Many opponents of S. 44 have asserted that such injured parties are entitled to recover in many States under current law and that, with respect to those States, S. 44 will constitute a setback for consumers.

On balance, however, even in the States cited by the opponents, there would be substantial consumer benefits to be gained by the passage of a uniform product liability law. Uniformity, perdictability and lower prices benefit all parties. Nonetheless, the concern of the opponents of S. 44 with respect to innocent victims of product injuries must not be trivialized or minimized in the course of addressing the very real concerns of manufacturers and product sellers. I believe we must continue to explore options pursuant to which the concerns of manufacturers can be address through a fault-based standard, while innocent victims can receive prompt and fair compensation for their injuries. I am convinced that our collective sense of fairness will demand no less than that both those goals be shared and achieved.

Additionally, some procedural aspects of this bill continue to cause me concern. Although the Committee report seeks to provide guidance to the courts in this regard, in my view the bill might well more specifically deal with issues such as the appropriate choice of law in diversity cases, to which court the trial court should look for guidance in interpreting and applying the provisions of the bill, the extent to which courts may continue to apply doctrines such as res ipsa loquitor, etc. The absence of express language on these subjects in the bill constitutes a disservice to the courts and does not contribute to the efficient and predictable administration of justice for which we strive.

Although these comments indicate areas of continued reflection and concern on my part, I do not wish to disparage the exceptional progress which has been made in this area due to the efforts of Senator Kasten. He is to be congratulated for bringing this important subject before the Senate and for sustaining a healthy debate on it. I am confident that a full review of the product liability issue by all the Members of the Senate and the House of Representatives will have a constructive impact on the process of the development of a uniform national law of product liability, which will better serve manufacturers, sellers, consumers and injured product users than does the status quo.

SLADE GORTON.

MINORITY VIEWS OF MR. HOLLINGS

INTRODUCTION

S. 44 is undoubtedly one of the worst bills this Committee has reported during my 18 years in the Senate. I urge my colleagues to reject it.

The legislation is obtuse, confusing, and unsound in its fundamental structure. It is unfair to consumers and workers and incapable of achieving its stated goal of uniformity. In addition, it would preempt 200 years of common law development in the State courts without any evidence of an actual crisis in product liability law.

Those advocating S. 44 have hailed the benefits this kind of codification would bring to our society. But in a recent letter to the members of the Senate, the Nation's four largest consumer groups stated an opposing view:

> S. 44 represents a devastating assault on the rights of thousands of individuals injured by defective products. This legislation, which its proponents tout as the route for simplifying the maze of State product liability laws, is nothing more than a codified obstacle course designed to thwart victim's compensation.

The issue is not the intent of the bill's proponents, but the consequences of the legislation itself. S. 44 would disturb the delicate balance between the claimant and the defendant in product injury cases. In a product liability lawsuit, both claimant and defendant seek advantages to use in the rather extensive procedure which may lead eventually to the courthouse door and ultimately to a settlement or jury trial. Yet, in the name of uniformity, S. 44 would shift the advantage to the defendant (the manufacturer) in a great many of the steps of what will remain a very long and drawn-out process.

For example, one provision of S. 44 would curtail the ability of injured consumers and workers to be awarded compensation from a manufacturer responsible for designing an unreasonably dangerous product if negligence cannot be proven. Through this provision, the bill would impose on victims a more difficult evidentiary burden than is currently required by the law in most States. No matter how serious the injury, no matter how many victims involved, and no matter how strong the evidence that a dangerously defective product injured the claimant—the standards of S. 44 would deny recovery if this burden of proof is not met.

One of the more useful aspects of our current product liability system is that, through the prospect of punitive damages imposed by the courts, an incentive is provided to manufacturers to avoid reckless behavior and design for safety. S. 44 would subvert this

purpose. In cases where several people are injured by a defective product, the bill would prevent a jury from levying punitive damages against the manufacturer if it had previously paid a nominal sum of punitive damages in settlement with the first victim injured by that defect in the product. Once a manufacturer paid punitive damages in one product liability case, a compelling incentive to remove his product from the market would be eliminated.

S. 44 contains many other provisions in which the scales of justice are tipped unfairly in favor of the defendant. There is no area in which S. 44 would provide injured persons with rights they don't already enjoy in many States. Additionally, the bill would impose a whole new series of legal boobytraps which would make it more difficult for a claimant to recover damages, as we heard from witnesses who testified during the March 5, 1984 hearings on the bill.

S. 44 represents a major departure from our Federal system of government. It would supersede all existing State case law and statutory law in the areas it covers. I associate myself with the minority views of Senator Heflin on this very important issue. The development and practice of common law in the States during the last 200 years has worked well to balance the interests of consumers and workers with those of product manufacturers, sellers, and distributors. The Federal preemption argument is a substantial one and would, by itself, be reason enough to oppose this bill. But the substantive and structural deficiencies of the legislation make the case against it even more compelling.

Why is this bill necessary? That is the one basic question for which proponents of S. 44 have continually failed to provide concrete answers. When the manufacturers began their hue and cry for reform in the mid-1970's, the reason was rapidly rising product liability insurance rates. When it became evident that the perceived insurance "crisis" was disappearing, they created a new reason for codification—namely, that the lack of uniformity results in higher transaction costs, diminished new product development, and the forced closings of companies. Yet they have not provided significant evidence to support this contention, nor have they demonstrated that S. 44, as written, would remedy the alleged problem.

All available evidence indicates that S. 44 would create more confusion and legal chaos than it would solve, and that it would likely raise, not lower, transaction costs. Although the bill purportedly is an attempt to set down a national uniform product liability code, it would nevertheless be interpreted differently by the thousands of State court judges as well as the many Federal courts. Noted legal scholars, State Supreme Court justices (who would be interpreting the law), and other experts agree: S. 44 would not achieve uniformity because of its obtuse, complex provisions and many new ambiguous terms, and because the fundamental structure allowing virtually no Federal review would negate any possibility of achieving cohesion.

The current system is not perfect. We have all heard of the rare case where judgment is made in favor of a claimant who clearly and outrageously misuses a product. We have also heard of cases where claimants have not recovered for injuries caused by manufacturers' defective products. But these disparities do not provide sufficient justification for a Federal solution.

My discussion of this legislation will focus on three points: (1) the inability of S. 44 to produce certainty and uniformity; (2) the absence of demonstrable need for any bill; and (3) the unfairness of S. 44 to injured product users. The clear and convincing evidence that S. 44 is nothing more than a feeble attempt to address a nonproblem, and that the consumers and workers of our Nation will be hurt greatly if it becomes law. S. 44 is one of the worst bills ever to be reported. It would create chaos in our legal system. It should be soundly defeated.

I. Inability To Produce Certainty and Uniformity

S. 44's stated purpose is to eliminate confusion and uncertainty in the current tort litigation system by replacing conflicting State statutes and court decisions with a single set of Federal standards. However, this legislation would not produce uniformity in the laws.

Scholars and jurists conclude that S. 44 contains so many novel, confusing and ambiguous terms and standards that its provisions would be subject to conflicting interpretations from fifty State Supreme Courts and the various Federal courts which would hear cases under diversity jurisdiction.[1] The bill provides for review of State decision by the United States Supreme Court only, and it is highly unlikely that the Supreme Court would intervene actively in the product liability area.[2] Thus, there would be no mechanism for guarding against or resolving these non-uniform interpretations resulting from this complex law. This system ensures that conflicts and disparities in the application of the bill would not lessen over time.

Testifying in opposition to S. 44, the Chief Justice of the Texas Supreme Court, representing the Conference of Chief Justices, underscores the bill's inability to accomplish its stated purpose:

> The bill, if enacted, will disturb product law that is already uniform in important respects, and it will destroy the developed common law in the whole range of tort reparations. The bill will disrupt practices and procedures that have been simplified and will require every State to begin again. The bill will require decades of interpretation to unravel new concepts and new definitions in the over-detailed provisions of the bill.[3]

As to the specific provisions of S. 44, a noted product liability scholar and legal commentator, Prof. Aaron D. Twerski of Hofstra University, School of Law, explains:

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[1] *Hearing on S. 44 Before the Subcommittee on the Consumer of the Senate Committee on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. 378 (1984) (statement of the Honorable Jack Pope, Chief Justice, Supreme Court of Texas, representing the Conference of Chief Justices) hereinafter cited as *1984 Hearings on S. 44* ; *id* at 443 (statement of Andrew F. Popper, Professor, American University, Washington College of Law); *id* at 481 (statement of Aaron D. Twerski, Professor, Hofstra University School of Law); *Hearings on S. 44*, 98th Cong., 1st Sess. 65 (1983) (statement of W. Page Keeton, Professor, University of Texas School of Law) hereinafter cited as *1983 Hearings on S. 44* ; *id* 158 (statement of Joseph A. Page, Professor, Georgetown University Law Center).

[2] *Hearing on S. 2631 Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation*, 97th Cong., 2d Sess. 19 (1982) (Statement of Professor Jerry J. Phillips, Professor, University of Tennessee School of Law) hereinafter cited as *1982 Hearings on S. 2631.*

[3] *1984 Hearings on S. 44*, supra note 1, at 378 (statement of Hon. Jack Pope, Chief Justice, Supreme Court of Texas, representing the Conference of Chief Justices).

> [I]n many ways the October 19, 1983 Draft [reported from the Committee] may yet be the worst of the versions to be presented for consideration. Admittedly, some very objectionable and confusing portions present in earlier drafts have been deleted. But this draft has introduced sections that are obtuse, confusing and simply unfair . . . Ultimately, this bill will find its way into every city and hamlet in this country, and will perforce be interpreted by thousands of trial judges. A bill which is obtuse and complex will only spawn endless litigation as to its meaning. Thus, the structure of a bill which seeks to encompass the entirety of litigation problems is begging for trouble.[4]

In commenting on the latest draft of the bill, the Library of Congress Congressional Research Service (CRS) states that "[t]he extent to which S. 44 would result in national uniformity seems questionable" and describes eleven major provisions lacking clarity.[5] Numerous witnesses at the hearings on S. 44 shared this conclusion. Such groups as the American Bar Association and the National Conference of State Legislatures testified that confusion, not uniformity, would occur with thousands of State court judges and many Federal judges interpreting the bill's complex and unclear provisions.[6]

Second, the bill would apply Federal standards only to manufacturers, product sellers, and those who have control over use of the product. Product-related injuries, however, frequently involve more than one cause; the actions of individuals who have no control over a product may be a contributing cause of a product-related injury. Under S. 44, a court would apply the Federal statute to the conduct of the manufacturer or product seller as well as to some third parties, but it would apply State law to the conduct of these other third parties who might have contributed to the injury. Therefore, S. 44 would create confusion in the product liability litigation system because it would not be clear how State courts should mesh the Federal and State rules.[7]

Finally, the legislation excepts cases brought under it from the jurisdiction of Federal courts except where there is diversity of citi-

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[4] *Id.* at 481 (statement of Aaron D. Twerski, Professor, Hofstra University School of Law).

[5] Congressional Research Service, The Library of Congress, Legal Analysis of the Product Liability Act (S. 44, 98th Cong.) As Reported Executive Summary (April 4, 1984) hereinafter cited as CRS Legal Analysis.

[6] *1984 Hearings on S. 44, supra* note 1, at 419 (statement of Jeffrey Teitz, Member, Rhode Island House of Representatives representing the National Conference of State Legislatures); *1983 Hearings on S. 44, supra* note 1, at 104-06 (statement of Ernest Y. Sevier, Chairman, American Bar Association Section of Tort and Insurance).

[7] *1983 Hearings on S. 44, supra* note 1, at 243 (statement of Hon. Jack Pope, Chief Justice, Supreme Court of Texas representing the Conference of Chief Justices); *id* at 106 (statement of Ernest Y. Sevier, Chairman, American Bar Association Section of Tort and Insurance Practice);

Aside from the general problem of how S.44 would mesh with State law, section 3 raises concerns about the extent to which S. 44 would preempt State statutory and common law causes of action that allow both individuals and States to recover for harm caused by hazardous wastes, toxic chemicals, and other products that contaminate or pollute the environment. The Committee has not received testimony on this critical issue. Section 3(b)(1) would preempt virtually all common law and statutory claims by private and State government claimants for judgments against manufacturers of products that cause injury or economic or commercial loss through environmental contamination. However, section 3(c), states that the act does not preempt "State laws creating a cause of action for damages caused by the release of a hazardous substance or waste as defined by State law." These sections are sufficiently inconsistent to result in litigation.

zenship between the parties. Under *Erie* v. *Tompkins,* the Federal courts that do hear cases because of diversity jurisdiction will be required to follow the interpretation of the bill developed by the courts of the State whose laws apply to the diversity case.[8] Consequently, cases in Federal court under diversity jurisdiction would not provide the opportunity for formulating a uniform application of the bill, and an independent Federal interpretation of S. 44 would arise only in rare occasions where the Supreme Court intervenes. Professors such as Jerry J. Phillips from the University of Tennessee Law School emphasize that it is "exceedingly unlikely" that the United States Supreme Court would choose to exercise jurisdiction.[9]

In a 1969 study of Federal jurisdiction, the American Law Institute concluded that cases arising under Federal statutes should not be left to the State courts as would be required under S. 44. One of the primary findings supporting that conclusion is that Federal jurisdiction is necessary to help ensure the uniform application of Federal law. S. 44 would greatly undermine this important objective.[10]

In summary, Part I of these views has shown that S. 44 would not create uniformity in the laws. Its terms are too vague; its provisions are too complex; its basic structure would lead to virtually no Federal review. In fact, the legislation would create more confusion and legal chaos than it would solve.

II. Absence of Demonstrable Need

The original justification for S. 44 was the so-called product liability insurance "crisis." In the mid-1970's, insurers mandated large increases in product liability insurance premiums, and numerous businesses stated that a solution to the "crisis" was essential.

The primary allegations concerning the existence and magnitude of this "crisis" were vastly exaggerated. In 1976 the Federal Government created a Federal Interagency Task Force on Product Liability (hereinafter Task Force) to examine the product liability insurance problem. The Insurance Study commissioned by the Task Force found that, while insurance costs did increase in the mid-1970's, insurance premiums exceeded 1 percent of the total sales for only three industries.[11]

Similarly, the frequent speculation about the staggering rise in the number of product liability lawsuits was unfounded. According to a recent study by the Rand Institute, statements by industry representatives that claims were approaching 1 million per year by the mid-1970's have been "thoroughly discredited." [12] In fact, the

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[8] *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1937).

[9] *1982 Hearings on S. 2631, supra* note 2, at 19 (statement of Jerry J. Phillips, Professor, University of Tennessee School of Law).

[10] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 165–68 (1969).

[11] U.S. Department of Commerce, Interagency Task Force on Product Liability, Final Report VI-20 (1977) hereinafter cited as Task Force Final Report.

[12] The Institute for Civil Justice, the Rand Corp., Designing Safer Products: Corporate Responses to Product Liability Law and Regulation 20 (1983) hereinafter cited as Designing Safer Products.

Task Force concluded that the "best estimate" of claims on lawsuits filed in 1976 was between 60,000 and 70,000.[13] Therefore, actually less than 1 percent of the estimated 30 million actual product-related injuries resulted in claims. And rather than huge sums being awarded as a result of product liability suits filed, a survey of claims adjudicated between July 1, 1976 and March 15, 1977 showed an average payment of bodily-injury claims of $3,592 per claim and $6,692 per incident.[14]

No evidence has been offered subsequently demonstrating a significant increase in the number of claims and lawsuits or the average payment of bodily-injury claims. In fact, recent evidence indicates that product liability costs have stabilized or decreased, and that the "crisis" has disappeared. The 1983 Rand study concludes not only that reports of a product liability "crisis" in the mid-1970's were greatly exaggerated, but that even the perception of a crisis has now receded because it has become evident that product liability claims have not been an unreasonable cost to most manufacturers.[15] The irony of the continuing debate over S. 44 is that even some proponents of S. 44 concede that the problem originally identified as the reason for enacting Federal legislation no longer exists.[16]

DISAPPEARANCE OF THE "CRISIS"

The product liability system did not cause the increases in insurance costs experienced in the mid-1970's.[17] As Prof. Joseph A. Page of Georgetown University Law Center shows in a recent article, the sources of excessive insurance costs were: (1) inflation, interest rates, and stock market conditions which led to losses by insurance companies in the early 1970's; and (2) subjective ratemaking by insurers which led to rates being set at levels higher than actual claim experience dictated.[18] Recent improvements in actuarial techniques and in economic conditions have resulted in lower insurance costs. As one manufacturer recently noted, "[b]ecause of factors that have nothing to do with the underlying product-liability law and more to do with interest rates and investment income, rates are competitive."[19]

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[13] Task Force Final Report, *supra* note 11, at VI-55.

[14] Designing Safer Products, *supra* note 12, at 29.

[15] *Id* at 121.

[16] *See* Product Liability Risk Retention Act of 1979: Hearings Before the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 2d Sess. 114 (1979) (statement of Donald J. Jordan, American Insurance Association); (*see also* Page, *The Product—Liability Insurance "Crisis:" Causes, Nostrums and Cures* 19 (forthcoming issue of Capital University Law Review) (manuscript on file at Senate Committee on Commerce, Science, and Transportation) hereinafter cited as Page, *The Product-Liability Insurance "Crisis"*.

[17] *See* Page, *The Product-Liability Insurance "Crisis"*, *supra* note 16, at 24.

[18] Page, *The Product-Liability Insurance "Crisis,"* *supra* note 16, at 5-11, 17-19. Ratemaking practices were subjective because insurers did not have reliable data, and, consequently, rates were being based not upon actual claim experience but upon the subjective judgment of the insurer. A follow-up report issued in 1980 by the Task Force concluded that for "a-rates" (the rates which include the bulk of product liability coverage) there are "substantial indicators that these rates have been established at a level in excess of that appropriate." *Id* at 10 (citing U.S. Department of Commerce, Interagency Task Force on Product Liability, ratemaking Report IX (1980).

[19] *Page, The Product Liability Insurance "Crisis,"* *supra* note 16 at 19 (citing telephone conversation between Prof. Joseph Page and James H. Mack, Public Affairs Director, National Machine Tool Builders Association (July 19, 1983)).

Current data demonstrate that product-liability insurance coverage in fact is both available and affordable. According to a 1981 article in "Business Insurance," "[p]roduct liability insurance premiums have leveled off or plunged during the last 3 years." [20] In 1983, a representative of a manufacturers' association stated that insurance is now available "at an amount and a price that [manufacturers] want," [21] and an article in the "American Bar Association Journal" reports that:

> "[t]he opportunity for small businessmen to keep insurance costs low has never been better. In the opinion of some agents and brokers, small businessmen who pay the same this year as last year for insurance are either not doing their homework or are being served by a neglectful agent or broker." [22]

Congress passed the Product Liability Risk Retention Act of 1981 (Public Law 97-45) after the Task Force's examination of the product liability issue. The act, which allows manufacturers to create their own product-liability insurance groups, was passed to resolve the problem of overly subjective ratemaking procedures in insurance by stimulating competition among insurers.[23] The fact that companies who complained of the high insurance rates in the mid-70's have evidenced little interest in forming risk retention groups is further evidence of the healthy competitive insurance market.[24] As suggested by a representative of the National Conference of State Legislatures, should product liability insurance rates begin to significantly rise again, the Risk Retention Act is in place, and manufacturers can counter any increase by forming risk retention groups.[25]

CURRENT SYSTEM NOT RESPONSIBLE FOR EXCESSIVE COSTS

Despite the disappearance of the insurance "crisis", the argument continues to be made that uncertainty in the tort system produces excessive costs. The contention is that the inability of manufacturers to predict potential liability, expanded tort doctrines, the excessive generosity of jurors in products liability cases, and increased litigation and transaction fees impose unnecessarily high costs upon manufacturers. These costs allegedly dampen productivity and adversely affect the competitive position of U.S. manufacturers.

The argument does not withstand scrutiny. The Institute for Civil Justice of the Rand Institute recently concluded that product liability costs in most cases are not excessive:

> I[t] appears safe to conclude that for most large manufacturing firms, product liability costs (including the cost of

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[20] Business Insurance, July 27, 1981 at 20.

[21] *Page, The Product Liability Insurance "Crisis," supra* note 16 at 19 (citing telephone conversation between Prof. Joseph Page and J . White, October 4, 1983).

[22] *Page, The Product Liability Insurance "Crisis," supra* note 16 at 14 (citing Nolan, New Insurance Coverages For the Small Businessmen, 69 A.B.A.J. 479 (1983).

[23] H.R. Rep. No. 97-172, 97th Cong., 1st Sess. 4 (1981).

[24] *See Page, The Product Liability Insurance "Crisis," supra* 16, at 168 n. 106.

[25] *1984 Hearings on S. 44, supra* note 1, at 418 (statement by Jeffrey Teitz, Member, Rhode Island House of Representatives representing the National Conference of State Legislatures).

> defending litigations and certain product liability prevention activities—probably amount to much less than 1 percent of total sales revenue.[26]

Equally important, there is no evidence demonstrating that the displacement of State product liability law by S. 44 would reduce product liability costs.

1. Product Liability Claims and Awards

The Legal Study commissioned by the Task Force concluded that "the volume and size of damage awards in all probability cannot be considered the direct cause of the alleged insurance problems." [27] Recent studies confirm that product liability claims are neither soaring nor being paid at excessive levels. For example, an Insurance Service Office study published in 1977 rejected the assertion that product-liability claims had increased dramatically. The study concluded that the amount paid in closed claims commonly had been overstated by seven to eight times and that the average amount paid per claim for bodily injuries was $3,592.[28] A Carnegie-Mellon investigation of State and Federal product-liability cases filed in Pennsylvania from 1963 to 1978 found no significant increases in either the number of legal actions or the amount of awards to claimants,[29] and statistics compiled for claim experience in Kansas in 1981 showed that the product liability closed claims averaged only $5,110.[30] Finally, according to a June, 1983 report by the Missouri Division of Insurance, the number of claims had dropped substantially from 1979 to 1981. As of early 1983, underwriters had filed for an average of 14 percent rate decreases.[31] The repeated allegations about the number and size of awards cannot suffice in light of this substantial contrary evidence.

2. Substantive Law

The Task Force concluded that uncertainties in the substantive law of products liability was a cause of the insurance "crisis." This conclusion, however, was at odds with the findings of the Legal Study commissioned by the Task Force. The Legal Study concluded that State tort rules have no significant impact on insurance costs, and thus a revision of the system would not lower them:

> [T]he overall conclusion drawn here is that although specific tort doctrines adopted by some courts can be considered inequitable in specific cases, the total impact of such rules on product liability claims is insufficient to directly cause an insurance problem of the magnitude alleged. In other words, no inequitable doctrine or group of doctrines,

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[26] Designing Safer Products, *supra* note 12, at 121.

[27] Interagency Task Force on Product Liability, Final Report of the Legal Study III-131-32 (1977), *cited in* Page, *The Product Liability Insurance "Crisis,"* *supra* note 16, at 21-22.

[28] Page, The Product Liability Insurance "Crisis," supra note 16, at 20; Designing Safer Products, *supra* note 12, at 29.

[29] Page, *supra* note 16, at 21, (citing) Department of Engineering and Public Policy and School of Urban and Public Affairs, Carnegie Mellon University, Product Liability Tort Reform: Crisis of Uncertainty; (1979).

[30] Page, *supra* note 16, at 21, (citing Dull, Kansas Insurance Department Product Liability Statistics and Closed Claim Report in Accordance With KSA 40-1130 (1982)).

[31] Page, *supra* note 16, at 21, (citing Ainsworth, Product Liability Close Claim Data in Missouri 1978-81 (1983)).

even if changed immediately, could produce a greater availability of or a lower cost for insurance.[32]

In a recent article examining this dispute, Prof. Joseph Page states that "the subsequent easing of the 'Crisis' supports the Legal Study and undercuts the Task Force on this critical issue." If there were a significant connection between legal doctrines and product liability costs, the stabilization of insurance costs in the late 1970's would not have occurred at the same time that the substantive law of product liability remained unchanged.[33]

As the Legal Study found, there are isolated instances of product liability cases in which the result is inequitable. However, the connection between such cases and insurance costs or other problems is far too attenuated to justify revision of an entire body of law which generally has proven to be fair and workable. Moveover, the arguments in favor of S. 44 often fail to separate the effect of uncertainties in the law from the effect of decisions in individual cases about the substantive content of the law. The purpose of S. 44 allegedly is to address the former rather than the latter.

3. Litigation and Transaction Costs

The most recent justification offered for S. 44 is that the creation of uniform product liability rules would reduce the amount of fees paid to attorneys. Various figures are frequently cited as support for the assertion that the amount of claimant and defense costs exceed the amount of claimant's recovery, and blame is attributed to the State tort litigation system.

Witnesses testified before the Committee that legal fees cited as emanating from product liability cases are exaggerated. Other figures useds are often misleading.[34] Moreover, since the figures are offered without any comparison to information about legal fees in other types of cases, there is no way to determine whether product liability cases generate larger legal fees.

More importantly, the shift in justification from insurance costs to legal costs largely is a fiction. To a significant extent, legal costs are not an independent cost because the insurer pays defense costs and thus defense fees are reflected in insurance costs.[35] And, as

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[32] Interagency Task Force on Product Liability, Final Report of the Legal Study 126 (1977).

[33] Page, *supra* note 16, at 22.

[34] The proponents of S. 44 often rely on the ISO Closed Claim Survey as support for the statement that for every 66 cents of claimants recovery, 42 cents are paid out in defense costs. This figure, however, includes the normal overhead of insurance companies necessary for the adjustment of product liability claims and is not limited to the amount of defense costs incurred for a specific claim. When the amount of costs actually incurred in defending a specific claim is examined, the picture changes. The ISO Survey found that defense costs allocated to a specific claim were, on the average, 28 percent of claimants recovery. In other words, for every dollar in recovery, defendants paid 28 cents, not 42 cents, to attorneys. Insurance Services Office: A Technical Analysis of the Survey Results Closed Claim Survey, 13 (1979). According to C. Thomas Bendorf, Executive Director of the Association of Trial Lawyers of America, an analysis of publicly available insurance information for the years 1979 to 1981 indicates that defendants paid 25 cents to attorneys for every dollar of net recovery to the claimant. 1982 Hearings on S. 2631, *supra* note 2, at 197 (statement of C. Thomas Bendorf, executive director, Association of Trial Lawyers of America).

More recently, figures from a Rand Corporation Institute for Civil Justice study of asbestos cases have been pointed to as support for the assertion that for every 59 cents of recovery, 99 cents was paid to claimant defense attorneys in all product liability claims. However, the figures relate only to asbestos litigation. Use of the asbestos figures to assert a trend toward increased legal costs is misleading because the figures relate to only a small precentage of product liability claims. Also, the complex nature of asbestos claims involve difficult factual and legal inquiries.

[35] *See* Task Force Final Report, supra note 11, at V-5.

previously demonstrated, insurance costs are competitive. The Rand Study noted that the finding that product liability costs did not exceed 1 percent of sales for large manufacturers included the cost of defending product liability claims.[36]

The legal cost argument is inadequate for the simple reason that S. 44 would not reduce legal costs. As a proponent of S. 44 states, the bill would not necessarily affect the ratio between legal fees and damages actually received by victims.[37] The Library of Congress also has concluded that it is questionable whether the pending product liability bills would have a substantial effect on legal fees:

> However, to the extent that these [legal] costs are inflated by the lack of national uniformity in product liability law, it seems questionable whether they would be substantially reduced by enactment of federal products liability legislation, at least in the form it is presently being considered. This is because it seems arguable whether the pending bills would significantly increase the national uniformity of product liability law.[38]

Even perfect uniformity would not significantly reduce the time and resources expended in presenting and defending product liability claims because most such costs do not relate to researching the applicable State law. In fact, the enactment of S. 44 would likely result in higher litigation costs in individual product liability lawsuits because many provisions would complicate these cases. For example, the elimination of strict liability in "design defect" and "failure to warn" cases would require the claimant to prove that the manufacturer knew or should have know about the danger that caused the injury. As a preeminent tort scholar from the University of Texas, School of Law, Dean W. Page Keeton, emphasizes, a primary reason to use a strict liability, rather than a negligence, standard is to avoid the difficulties entailed in deciding whether a manufacturer was excusably ignorant of the dangers posed by its product:

> One of the most important justifications for eliminating the negligence theory altogether is that doing so eliminates several complicated questions concerning whether the maker knew or should have known in the exercise of ordinary care about the extent of the dangers involved in the use of the particular product.[39]

According to Dean Keeton, a strict liability standard saves judicial and litigation resources because "[t]his eliminates a number of difficult decision points, would greatly simplify a trial, and enhances the likelihood of settlements."[40] Similarly, the punitive damages section of S. 44 in effect would require that two trials be conducted—the first on the question of liability and the second on the

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[36] Designing Safer Products, *supra* note 12, at 21.
[37] "Wall Street Journal," Roger Miller, Professor of Economics, University of Miami, April 4, 1984.
[38] Congressional Research Service, The Library of Congress, The Effect of Federal Products Liability Legislation on Legal Fees 3 (April 27, 1984).
[39] Keeton, *Products Liability-Inadequacy of Information*, 48 Tex. L Rev. 398, 403, (1970).
[40] *Id.* at 408.

question of punitive damages. The requirement in section 10 that the jury determine the amount of workers' compensation benefits to which an injured worker would be entitled also would increase costs. Finally, the basic standards of liability or design defect and failure to warn cases would in practice be unnecessarily complex. A state Supreme Court judge has interpreted section 5(b)(1) to require the resolution of eight special interrogatories.[41]

Finally, S. 44 would not reduce legal costs in any given claim or lawsuit. Total legal costs in the product liability area might decrease only if the substantive standards, in S. 44 operate to preclude individuals from bringing claims or from pursuing such claims agressively. One torts scholar pointed out the chilling effect of a negligence standard: "[P]roduct liability suits usually are financed through contingent fees. To the extent that attorneys perceive 'tougher odds' under a negligence regime, they will be less willing to take on cases than they would be under a rule of strict liability. Plaintiffs will thus be unable to 'finance' their litigation." [42]

4. New Product Development, Business Failures, and International Trade

It is often argued that uncertainties in the tort system adversely affect new product development and even cause businesses to close operations. However, the Task Force could find no substantiation for the allegation that product liability costs have significantly deterred the development of worthwhile new products.[43] In fact, one of the two basic reasons the National Governor's Association opposes S. 44 is that "there has been no demonstration that manufacturers have been inhibited in the development of new product lines or in the improvement of existing products as a result of variations from state-to-state in product liability laws." [44]

The Task Force also could not substantiate the assertion that product liability "problems" were forcing companies out of business. The Task Force noted only that circumstantial evidence suggests that increases in product liability premiums might be one of several causes leading to the closing of small businesses in high-risk product lines.[45]

Anecdotes continue to be offered about disincentives to new product development and business failures. However, despite repeated inquiries, proponents continually fail to produce any comprehensive evidence that the current product liability system causes either decisions not to develop new products or the bankruptcy of companies that have not manufactured unreasonably dangerous products.

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[41] 1984 Hearings on S. 44, *supra* note 1, at 380 (testimony of Hon. Jack Pope, Chief Justice, Supreme Court of Texas representing the Conference of Chief Justices).

[42] Page, *Generic Product Risks: The Case Against Comment K and for Strict Tort Liability*, 58 N.Y.U. L. Rev: 884 n. 136 (°1983).

[43] Task Force Report, *supra* note 11, at VI-29.

[44] Letter from the National Governors Association to Senator Ernest F. Hollings (March 16, 1984).

[45] Task Force Final Report, *supra* note 11, at VI-32. And see Designing Safer Products, *supra* note 12 at 122. The Rand study found that asbestos presents an exceptional case in terms of the potential liability cost to the industry.

Finally, it is alleged that uncertainties in the tort law have an adverse effect on international trade. The basis of the allegation is that insurance costs are significantly higher in the United States than in Europe and elsewhere. However, as previously demonstrated, the product liability system is not responsible for excessive insurance costs, and S. 44 would not reduce those costs.

In summary, Part II of these views has shown that there is no statistical proof that the legislation is necessary. Less than one percent of the 30 million annual product-related injuries result in claims and, in any case, studies demonstrate that the numbers and average size of awards are not excessive. Product liability insurance costs, as well as total product liability costs, do not exceed one percent of gross sales in the vast majority of industries. Furthermore, the Legal Study commissioned in the late 1970's by the Task Force on Product Liability concluded that State tort rules have no significant impact on insurance costs. There is a lack of substantiation for the allegation that product liability costs have significantly deterred new product development or, in other than a few isolated cases, forced companies out of business.

Finally, S. 44 would not reduce legal costs in any given claim or lawsuit. In fact, the enactment of S. 44 would likely result in higher litigation costs because many provisions of the bill would complicate individual product liability lawsuits and because the bill would not result in uniformity. The only way total legal costs might decrease in the product liability area is if S. 44 operates to prevent injured product users from even bringing claims or from pursuing such claims aggressively. In that case, the simple effect of S. 44 will be to undermine our legal system's guaranteed right of access to justice.

III. Unfair to Injured Product Users

Despite numerous revisions of S. 44 and similar versions proposed in the last Congress, the legislation remains inequitable. A broad coalition of women's, labor, and consumer organizations, tort scholars, representatives of the Conference of Chief Justices, and the National Conference of State Legislatures continues to emphasize that: (1) the latest version of S. 44 remains obtuse, complex and subject to interpretations that are harmful to the victims of defective products; and (2) the legislation contains unfair provisions which curtail the ability of injured consumers and workers to receive compensation when injured by defective products.

The Consumer Federation of America's Legislative Director has recently explained that countless injured product-users would not recover damages in cases where they would do so under current law:

> Legal scholars can (and do) debate the question of negligence vs. strict liability endlessly, but the policy implications are crystal clear: victims lose under the Kasten bill. Hundreds of thousands of consumers and workers would be unable to recover when injured by hazardous chemicals, the side-effects of potent drugs or the loss of limbs in industrial machine accidents unless they can prove negligence—no matter how great the danger, no matter how se-

rious the harm, no matter how strong the evidence of causation.[46]

The AFL–CIO emphasizes the concern of the organization with S. 44:

> At a time when the public at large and workers in particular are concerned with the effects of toxic chemicals, untested drugs and other dangerous products, Congress has taken the first step to permit manufacturers to escape liability for harm caused by these dangerous items. Acting under the guise of a desire for uniformity and cost savings, the Senate Commerce Committee passed the product Liability Act which drastically alters traditional common law concepts of recovery for injuries caused by defective and/or dangerous products.[47]

Similarly, the Women's Equity Action League, National Organization for Women, and several other women's and health organizations conclude that S. 44:

> reads as if it were drafted specifically to prevent women injured by defective drugs and devices from being compensated for their injuries, and to reduce the incentive for manufacturers of those products to make their products safe.[48]

For example, the National Women's Health Network and Consumers Union recently identified numerous provisions of S. 44 as shielding manufacturers of defective products from paying damages commensurate with the resulting harm. These provisions included: elimination of strict liability in cases involving design effects or the failure to provide adequate warnings; the expansion of defense available to manufacturers; the restriction on punitive damages; and the imposition of a statute of repose.[49]

Tort professor Andrew F. Popper of Washington College of Law, American University, concludes that S. 44 consistently provides only the bare minimum of protection available under State law, and in some areas, eliminates State law protections altogether.[50] It is clear from Professor Popper's analysis that the inequitable nature of S. 44 does not stem from the unfairness of any single provision in the legislation. At almost every turn, the bill establishes a rule or standard tilted against the injured product users.

The resolution of a product liability claim often is a lengthy process in which the manufacturer and the claimant seek a basis for obtaining an advantageous settlement or making a successful appeal to the jury. The various aspects of a product liability case—

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[46] Greenburg, *Safety, Justice and Product Liability Law*, At Home With Consumers, 5 (March 1984).

[47] AFL–CIO, *Issue Alert—The Product Liability Act Will Victimize Injured Workers*, Fact Sheet 98–21 (May 3, 1984).

[48] Letter from Women's Equity Action League, American Public Health Association, Business and Professional Women's Clubs, DES Action, National Organization of Women, Public Voice for Food and Health Policy to Members of the Senate (March 26, 1984).

[49] *1984 Hearings on S. 44, supra* note 1, at 420–21 (statement of Elizabeth Langer, National Women's Health Network); Letter from Consumers Union to the Senate Committee on Commerce, Science, and Transportation (March 1984).

[50] *1984 Hearings on S. 44, supra* note 1, at 446 (statement of Andrew Popper, Professor, American University, Washington College of Law).

proof that the basic standard of liability has been violated, the assertion of defenses, the introduction of certain types of evidence, and the apportionment of damages—all may be crucial to resolution of a product liability claim. S. 44 clearly skews this process against the victim.

As the following summary of some of the major problems in the bill shows, the statutory language of the legislation would be interpreted to create barriers to recovery for the claimant, whether intended or not. Witnesses favoring the legislation at committee hearings, have largely ignored the potential problems; but in some cases they have actually contradicted the clear language of the bill. In the instances where the language of the statutory provision is clear, however, the court would look at the plain meaning of the statute.

SECTION 5 AND SECTION 6—THE STANDARD OF LIABILITY FOR DESIGN DEFECT AND FAILURE TO WARN CASES

Assuming that a claim is not barred by the statute of repose (see discussion of section 11), one of the initial steps in a product liability trial is to determine whether the manufacturer violated the standard of liability governing the marketing of products. Section 5, concerning design defects, and section 6, concerning the failure to give adequate warning, would overturn the law in the majority of States to discard the strict liability standard.[51] Moreover, the particular negligence tests in sections 5 and 6 are both confusing and overly protective of the interests of manufacturers.

1. Discarding Strict Liability

The vast majority of States now treat design liability cases in terms of strict liability as well as negligence. The States have adopted the Restatement (Second) of Torts, which, in 1965, established a strict liability standard of responsibility, or its equivalent. S. 44 would reverse State law to discard the strict liability standard.[52]

The reversal of State law would render recovery of compensation for injuries caused by defective products more difficult. A strict liability standard focuses upon the condition of the product and requires the claimant to prove it unreasonably dangerous. In contrast, a negligence standard entails a difficult and often subjective inquiry into the manufacturer's state of mind. This standard requires a showing by the claimant that the manufacturer knew or

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[51] Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U.L. Rev 734, 748 (1983) [hereinafter cited as Wade, *Knowledge Unavailable Prior to Marketing*].

[52] Restatement (Second) of Torts, 402A; Wade, *Knowledge Unavailable Prior to Marketing*, *supra* note 51, at 748. *See also Blevins* v. *Cushman Motors*, *551 S.W. 2d 602, 607 (Mo. 1977) which states that the following are among the courts that have adopted a strict liability standard for design defect cases: Mather* v. *Caterpillar Tractor Co.*, 23 Ariz. App. 409, 533 P.2d 717 (1975) *Rindlisbaker* v. *Wilson*, 95 Idaho 752, 519 P.2d 421 (1974); *Allen* v. *Kewanee Machinery and Conveyor Co.*, 23 Ill. App.3d 158, 318 N.E.2d 696 (1974); *Brandenberger* v. *Toyota Motor Sales, U.S.A., Inc.*, 162 Mont. 506, 513 P.2d 268 (1973); *Deem* v. *Woodbine, Mfg. Co.*, 89 N.M. 50, 546 P.2d 1207 (N.M.App. 1976); *Seibel* v. *Symons*, 221 N.W.2d 50 (N.D.1974); *Phillips* v. *Kimwood Machine Co.* 269 Or. 485, 525 P.2d 1033 (1974); *Engberg* v. *Ford Motor Co.*, 205 N.W.2d 104 (S.D.1973); *Pizza Inn, Inc.* v. *Tiffany*, 454 S.W.2d. 420 (Tex.Civ. App.1970); *Seattle-First National Bank* v. *T.E. Tabertt*, 86 Wash.2d 145, 542 P.2d 774 (1975); *Arbert* v. *Gustarson*, 66 Wis. 2d 551, 225 N.W.2d 431 (1975).

should have known about the unreasonably dangerous aspect of the product that caused by the Claimant's injury.[53]

Strict liability is not absolute liability. The injured product-user must prove that the product was defective in such a manner as to be unreasonably dangerous. In contrast, as one legal commentator has pointed out, "a rule of absolute liability would hold manufacturers responsible for all harm causally related to a product whether or not the product was defective." [54]

S. 44 applies strict liability to construction defect cases but not to design cases. As the California Supreme Court has explained, however, "there is no rational distinction" between a construction and a design defect for purposes of assessing a manufacturer's liability, "since a product may be equally defective and dangerous if its design subjects protected persons to unreasonable risks as if its manufacture does so." [55] In fact, as the Missouri Supreme Court has pointed out, the first case applying strict liability, *Greenman* v. *Yuba Power Products,* was a design case.[56] Thus, it is well settled that strict liability applies to design defect as well as manufacturing defect cases.[57]

Nor is it true, as is contended, that strict liability and negligence in practice become equivalent standards. For example, a jury in a recent Oregon case expressly found that the manufacturer of the Dalkon Shield intrauterine device was not negligent but that the

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[53] The Court in *Roach* v. *Kononen,* 269 Ore. 457, 465, 525 P.2d 125, 129 (1974) described the difference in focusing on the product and the manufacturer's conduct:

> [T]he basic difference between negligence on the one hand and strict liability for a design defect on the other, is that in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did.

Dean Wade also has stated that the difference between negligence and strict liability is clear:

> The real distinction is already clear enough. Although the actionable condition of the product may be the same for both actions, in negligence the plaintiff must also prove negligent conduct in creating that condition or failure to discover and correct it; in strict liability this is not reqired.

Wade, *On Product "Design Defects" and their Actionability,* 33 Vand. L. Rev. 551, 569 (1980).

[54] Page, *Generic Product Risks: The Case Against Comment K and for Strict Tort Liability,* 58 N.Y.U.L. Rev. 853, 873 n. 91 (1983). Dean Wade recently has emphasized the same point:

> Courts and commentators are in agreement that strict liability does not mean an insurer's liability. Matches start enemy fires as well as friendly fires, knives cut human flesh as well as other kinds of meats; guns kill people as well as game, automobiles kill people and smash each other up. Yet in these cases there is no automatic liability on the part of the manufacturer. There must be something wrong with the product for liability to be imposed.

Wade, *Knowledge Unavailable Prior to Marketing, supra* note 51, at 741.

The fact that courts shifted the proof requirement under the strict liability standard away from the conduct of the manufacturer does not mean that manufacturers found liable for marketing unreasonably dangerous products are being penalized when they are "innocent". As Chief Justice Pope of the Supreme Court of Texas has explained:

> "Innocent" is not a term used to describe the responsibility of a manufacturer of consumer products unless one is discussing the criminal (or lack thereof) nature of his behavior. "Innocence" and "guilt" have nothing to do with civil liability.

Rather, the purpose of strict liability is to require the payment of monetary damages from the party responsible for manufacturing a defective and unreasonably dangerous product. *1982 Hearings on S. 44, Supra,* note 1, at 242 (statement of Hon. Jack Pope, Chief Justice Supreme Court of Texas representing the Conference of Chief Justices).

[55] *Blevins* v. *Cushman Motors,* 551 S.W. 2d 602 (Mo. 1977) (quoting *Pike* v. *Frank G. Hough Co.,* 2 Cal. 3d 465, 85 Cal. Rptr. 629, 636, 467 P.2d 229, 236 (Cal. 1970)).

[56] *Blevins* v. *Cushman Motors,* 551 S.W. 2d 602 (Mo. 1977) (construing *Greeman* v. *Yuba Power Products, Inc.,* 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (Cal. 1963)).

[57] *See* note 52 *supra.*

product was defective.[58] One of the great ironies in the argument made by proponents of S. 44 is that although they contend that sections 5 and 6 would not really revise current law because courts treat strict liability and negligence in the same way, they also argue that strict liability must be eliminated because it produces uncertain results that would be avoided through application of a negligence standard. One of the nation's preeminent tort scholars, Dean John Wade of Vanderbilt University Law School has explained that there is a real distinction between strict liability and negligence in design and failure-to-warn cases:

> The great majority of States now treat design cases in terms of strict liability as well as negligence. If these cases are likely to come out the same way on either theory, why change the strict liability approach? Although the additional requirement that the defendant must be shown to have breached a duty to exercise reasonable care generally would be met if the inference of negligence were used, the factfinder would still be required to decide this additional issue. Additional evidence might have to be introduced on both sides, rendering the trial more complex and confused. In order to demonstrate due care, the defendant would present evidence of what it did during the design process. This presentation could be obfuscatory and certainly would lengthen the trial and actionability in strict liability design cases that avoids any issue of negligent conduct. The same position also may be taken in the failure-to-warn cases.[59]

In observing that negligence is often present when a product is designed defectively, the proponents of S. 44 are correct, and in most cases, claimants will plead both negligence and strict liability. However, courts have adopted strict liability in design and failure-to-warn cases in order to avoid the difficulties entailed in making the additional showing that the manufacturer of a defective product also was negligent.

Despite the claims of many proponents of S. 44, a negligence standard does not provide an objective test of liability that is fairer and more easily applied than a strict liability test. Because obtaining and presenting evidence on the manufacturer's state of knowledge is difficult, time-consuming, and confusing, a negligence test creates unnecessary obstacles to recovery.[60] In finding for the claimant, cases explain that the additional evidentiary burden of proving negligence is not necessary.[61] Though negligence may be

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[58] *Pamela van Duyn* v. *A. H. Robins*, Civil No. 79-801 (D. Ore. March 1, 1984). *Van Duyn* is one of the largest cases in terms of the number of claimants to go to trial and verdict.

[59] Wade, *Knowledge Unavailable Prior to Marketing*, *supra* note 51, at 748.

[60] *See supra* text accompanying note 51. Keeton, *Products Liability—Design Hazards and the Meaning of Defect*, 10 Cumberland L. Rev. 293, 296 (1979); Keeton, *Products Liability—Inadequacy of Information*, 48 Tex. L. Rev. 398, 407-09 (1970). *See also* 1984 Hearings on S. 44, *supra* note 1, at 389 (Statement of Charles O'Reilly, Asbestos Victims of America).

[61] *Tinnerholm* v. *Parke, Davis & Co.* 411 F.2d 48 (2nd Cir. 1969); *Smith* v. *Smith*, 278 N.W. 2d 155, 160 (S.D. 1979); *Blevins* v. *Cushman Motors*, 551 S.W. 2d 602, 607 (Mo. 1977); *Newman* v. *Utility Trailer & Equipment Co., Inc.*, 278 Ore. 395, 564 P.2d 674 (Ore. 1977); *Phipps* v. *General Motors Corp.*, 363 A.2d 955 (Md. 1976); *Crocker* v. *Winthrop Labs*, 514 S.W. 2d 425 (Tex. 1974) (Dictum); *McCormack* v. *Hankscraft Co.*, 154 N.W. 2d 488, 500 (Minn. 1967); and *Dippel* v. *Sciano*, 155 N.W. 2d 55, 63 (Wis. 1967).

present in defective design cases, it cannot necessarily be proven.[62] A negligence test thus may allow manufacturers to escape liability even where a product clearly is defective and unreasonably dangerous.

The basic goals of strict liability include: (1) the fair compensation of injured product users; (2) the proper allocation of costs of an injury; and (3) the deterrence of injuries.[63] By discarding the strict liability standard, S. 44 frustrates the realization of these goals in product injury cases.

The first goal of strict liability is the fair compensation of injured product users. Whether intended or not, the result of enactment of S. 44 would be to deny claimants the "make whole" compensation traditionally provided by tort law. Individuals injured by defective products would not recover damages in cases where they cannot overcome the obstacles to proving negligence.[64]

Even proponents of S. 44 recognize that the bill would leave injured product-users, such as victims with latent injuries resulting from long-term exposure to chronic hazards, without compensation unless they can prove negligence. These cases often involve dangers of which the manufacturers claims it could not have had knowledge, and the issues presented are extremely complex. Some proponents of S. 44 merely criticize the courts for their efforts to compensate victims in such cases; others express interest in solutions such as an administrative system of no-fault compensation. Why should we freeze these victims out of the system under legislation such as S. 44, when other solutions for their recovery are merely being discussed?

The second goal of strict liability is the proper allocation of the costs of an injury.[65] Injuries caused by unreasonably dangerous products impose real costs upon society. Because the elimination of strict liability lessens the incentives for the production of safe products, these costs may increase. The Chairman of Rhode Island's House Judiciary Committee, representing the National Conference of State Legislatures, emphasized that S. 44 would not address problems relating to the marketing of defective products but would merely shift the costs from manufacturers to the individual and the government:

> In fact, S. 44 is not a feasible means of dealing with the problem of product liability costs and subsequent insurance costs. The bill only shifts the costs from manufacturers and sellers of defective products to individuals and the public welfare system. The problem of injuries caused by defective products is not solved by ignoring it.[66]

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[62] *See supra*, text accompanying note 58.

[63] S. Baldwin, F. Hare & F. McGovern, The Preparation of a Product Liability Case 32 (1981).

[64] *See supra* text accompanying note 58; *see also* 1984 Hearings on S. 44, *supra* note 1, at 409–10 (statement of Charles O'Reilly, Asbestos Victims of America).

[65] Risk allocation has been a central concern of tort law since long before the advent of modern product liability law. Prosser, the Law of Torts 22 (4th Ed. 1971). Under strict liability, the court does not instruct a jury that it should find a manufacturer liable because it is better able to prevent and to pay for injuries. The issue before the jury is whether the product was unreasonably dangerous and whether it caused the injury.

[66] *1984 Hearings, on S. 44, supra* note 1, at 418 (statement of Jeffrey Teitz, Member, Rhode Island House of Representatives representing the National Conference of State Legislatures).

Strict liability allows for a more equitable distribution of product liability costs because the manufacturer of an unreasonably dangerous product not only is responsible for manufacturing the defective product and is in a better position to prevent the injury but also has profited from distribution of the injury-causing product.[67] The costs imposed by an unreasonably dangerous product thus are a cost of doing business, and these costs, even if passed on to consumers, do not significantly increase the price of products. According to one estimate, the total amount of product liability claims paid in 1979 amounted to roughly 18 thousandths of 1 percent of the GNP.[68]

The third and perhaps most important goal of strict liability is to provide incentives for safety. In fact, a recent study by the Rand Institute concluded that "of all the various external social pressures, product liability has the greatest influence on product design claims." Specifically, the Rand Corporation noted, "Growing corporate awareness of product liability issues, spurred in several instances by suits that resulted in substantial individual judgments against firms, increased the willingness of these organizations to establish formal corporate product safety activities."[69] Moreover, "if toxic torts remain in the existing tort system, producers will introduce new materials with greater caution and invest more in investigating the health effects of materials."[70]

The Task Force, formed by the Federal Government in 1976 to study the issue of product liability costs, found that unsafe manufacturing practices were a major cause of the product liability problem in the mid-1970's.[71] The elimination of strict liability would exacerbate the problem of unsafe manufacturing practices. The AFL–CIO opposes the most recent draft of S. 44, explaining that the legislation severely reduces the incentives to encourage the safe design and marketing of products:

> It is a rare day's news report that does not include a reminder of the harm caused by inadequately tested chemical compounds. Given the great number of these products entering commerce, the limited understanding of their possible toxic effects, and the long latency periods often involved, we do not believe that a lessening of the responsibility imposed on their manufacturers is the responsible course . . . So far as we have been able to determine, a strict liability standard provides the strongest incentive for the manufacture of safe and beneficial chemical products and such an incentive is urgently needed.[72]

Mr. Frank Rafferty of the International Brotherhood of Painters and Allied Trades states that strict liability for failure to warn of dangers has resulted in improved product warnings:

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[67] *See* Vandall, *Undermining Torts' Policies: Products Liability Legislation*, 30 Amer. U.L. Rev. 673, 696-98 (1981).

[68] *1982 Hearings on S. 2631*, *supra* note 2, at 197 (statement of C. Thomas Bendorf, Association of Trial Lawyers of America).

[69] Designing Safer Products, *supra* note 12, at 106.

[70] *Id.* at 8.

[71] Task Force Final Report, *supra* note 11 at 1-20.

[72] *1984 Hearings on S. 44*, *supra* note 1, at 475 (statement of AFL–CIO).

> Just for one moment, consider the dilemma facing many of our Union's 180,000 members who are made chronically ill by paint products with which they work, because manufacturers have failed to provide instructions for safe use and failed to warn users about the chronic health effects caused by these products. Most manufacturers label their products with meaningless phrases such as "use with adequate ventilation," that neither convey the magnitude of health risks nor make full use of proven labeling methods.
>
> For example, it is possible to determine the exact amount of fresh air in cubic feet that must be mixed with a given quantity of a paint product to dilute its toxic concentration to "safe" levels. This air volume requirement could appear on the product label in place of "use adequate ventilation." But even with such clear solutions readily available, all our efforts of the past to get better labels from manufacturers have failed. Most merely say that providing adequate ventilation is the painting contractor's responsibility. Yet the contractor is free from the economic consequences of this responsibility due to limited liability under worker compensation. Few, if any, workers receive compensation for their work-related illnesses; less than 6 percent of all occupational illness compensation claims are successful. This impasse has just recently begun to resolve following several successful product liability cases against manufacturers brought by our members and other painters on the basis of defective products [strict liability]. As a result of these suits, many paint manufacturers have begun to take a real interest in improving their labels. Without these liability case. I am certain little interest would have been shown.[73]

2. Restrictiveness of Negligence Standard in Sections 5 and 6

One torts scholar calls the negligence test in section 5(b)(1)(A) "one of the most outrageous sections of the act" because "[i]t is clear derogation of the common law and is simply unfair." [74] Under S. 44's negligence standard test, a manufacturer would escape unless the claimant proves that it knew or should have known about the *specific* danger that caused the claimant's injury. It would be irrelevant whether the manufacturer knew or should have known about the many potential dangers posed by the product so long as the particular danger was not foreseeable. As the professor explains, "This is not the law now and never has been the law. What this Draft [S. 44] has done is to exclude from liability *risks* which are not identical to those which the defendant should have foreseen." [75]

The negligence test in section 6, according to the commentor, is "even more objectionable than section 5 in its constant reiteration

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[73] Letter from S. Frank Raftery on behalf of the International Brotherhood of Painters and Allied Trades to Senator Ernest F. Hollings (April 9, 1984).

[74] 1984 Hearings, on S. 44, *supra* note 1, at 485 (statement of Aaron D. Twerski, Professor, Hofstra University School of Law).

[75] *Id.*

of the theme that the defendant is liable only if it should have known about the danger." He explains:

> Since the function of a warning is to give a consumer the choice as to whether he/she wishes to purchase the product, the failure to warn of risks A & B which were known should not preclude recovery for risk C which was not known, if the consumer would have refused to purchase the product at all.[76]

3. Further Limitations on Liability Included in Negligence Standard of Section 5

Under section 5, the claimant has the burden of pursuading the jury or judge on the issue of the defendant's liability. In addition, S. 44 identifies three situations in which a manufacturer is to be absolved of liability even if the claimant proves that the manufacturer was negligent. Consequently, the basic standard of liability in S. 44 would be even more protective of the interest of manufacturers than a negligence test and is "giving the manufacturer second and third chances" according to Dean Wade. He explains: "If this statute is using the negligence approach, then it is inappropriate to utilize a number of these defenses which were developed for strict liability." [77]

a. Practical Technological Feasibility

Under section 5(b)(2)(A), a product is not unreasonably dangerous even if the manufacturer knew or should have known about the danger if a means to eliminate the danger was not within "practical technological feasibility, and the benefits and usefulness of the product to the public outweighed the likelihood and probable seriousness of the harm." Section 2(9) defines "practical technological feasibility" in terms of the knowledge relating to the safety of a product which at the time of production or manufacture was "developed, available and capable of use in the manufacture of a product, and economically feasible for use by a manufacturer." Although the burden of proof is upon the manufacturer, the claimant would be required to produce evidence relating to the state of knowledge and practices in an entire industry if the manufacturer were to raise practical technological feasibility as a defense.[78] One tort scholar concludes that "ideas that are available and easy to implement but not yet implemented" would not be within "practical technological feasibility." [79]

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[76] *Id.*

[77] Telephone conversation between Minority Committee staff and Prof. John Wade, Vanderbilt University School of Law (May 7, 1983).

[78] The court will look at the plain meaning of the statute. The language of the statute indicates that the effect would indeed be to allow the industry standard as a defense since the claimant must establish that the safer technology was "developed, available, and capable of use" when the product was manufactured. Section 2(9) telephone conversation between minority committee staff and Prof. Aaron D. Twerski (May 16, 1984).

[79] *1984 Hearings on S. 44, supra* note 1, at 456 (statement of Andrew F. Popper, Professor, American University, Washington College of Law).

b. Unavoidably Dangerous

Under section 5(b)(2)(B), a manufacturer would not be liable for an injury even where the manufacturer was negligent if the harm was caused by an "unavoidably dangerous product." "Unavoidably dangerious product" is defined as a product that is (a) "useful and desirable to the public," (b) "has a known reasonable risk which, in light of the state of scientific and technical knowledge at that time, cannot be made safe without impairing the effectiveness of the product's intended and ordinary use," and (c) "would have been made by a reasonable manufacturer using that particular design or formulation." One leading torts scholar has posed the question of whether the section adds anything to the negligence test in light of the fact that the negligence test already embodies a reasonableness standard. He has concluded that the probable answer is that the section makes the imposition of liability even less likely than under a negligence test:

> There are several possible answers. The first is that it is not intended to add anything at all, but merely to emphasize the obvious; negligence is the operative standard and "we really mean it." If that were the sole interpretive possibility, this Section would be comparatively harmless. However, courts are not likely to read a statute in that manner. They are likely to come across the language which enjoins a court from finding a product defective if the dangerous aspect of the product could not have been eliminated "without impairing" its effectiveness. This, then, amounts to something less than a negligence test. One is not required to utilize even well-founded technology if to do so would impair the usefulness of the product.

He recommends that the section be "excised from the bill." [80]

c. Inherent Characteristic

Section 5(b)(2)(C) absolves the manufacturer of liability for a design defect if the defect causing the injury "was an inherent characteristic of the product" and "would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community." A leading torts scholar points out that there are three possible ways to interpret this language: (1) it is unnecessary; (2) it is unintelligible; or (3) it is a devious articulation of the patent danger rule. The most likely interpretation, he concludes, is the third. He explains:

> A court interpreting this section is not likely to find that it meant to legislate a non-problem. It is much more likely that a court will read this language to express (somewhat clumsily) the patent danger rule. This totally discredited doctrine immunizes a manufacturer from liability when the danger is open and obvious. The term, "inherent characteristic," when combined with the latter part of the statute which limits liability if such a characteristic "would be

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[80] *1984 Hearings on S. 44, supra* note 1, at 488 statement of Aaron d. Twerski, Professor, Hofstra University School of Law).

> recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community," certainly smacks of the patent danger rule.[81]

Although the "patent danger" rule was once the majority rule, as the Task Force concluded in 1977, "[t]he majority view is now that the open and obvious nature of the danger is only one factor to be considered in conducting the balancing test of defectiveness." [82] The courts refused to apply the patent danger rule because it discouraged safety. As the Florida Supreme Court noted in rejecting the rule in a case in 1979:

> The patent danger doctrine encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious. For example, if the cage which is placed on an electric fan as a safety device were left off and someone put his hand in the fan, under this doctrine there would be no duty on the manufacturer as a matter of law. So long as the hazards are obvious, a product could be manufactured without any consideration of safeguards.[83]

4. Additional Elements of Negligence Standard of Section 6a. Requiring Proof That the Injured Person Would Have Obeyed a Warning

Under section 6(b)(3), the claimant is required to prove, as part of his prima facie case, that if the manufacturer had provided warnings "a product user in the course of reasonably anticipated conduct" would have avoided the harm. Under current law, in contrast, claimants often benefit from a presumption that they would have read and heeded an adequate warning or instruction.[84]

The extra burden imposed on the injured person by this section would be particularly inappropriate, one tort scholar notes, with regard to drugs and industrial chemicals. He emphasizes that the section "would become the basis of a jury instruction and would thus be contrary to the practice of the vast majority of courts," and concludes that "any thought that this section is merely a restatement of existing case law is simply unwarranted." [85]

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[81] *Id.* Witnesses for the proponents have said that Section 5(b)(2)(C) incorporates principles of comment "i" of the Restatement (Second) of Torts Section 402A Professor Twerski emphasizes that the statutory language will nevertheless be included in every jury instruction in every case of patent danger. Further, comment "i" has been misinterpreted by a number of courts as a form of the patent danger rule. *See* Twerski, *From Risk Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 Hofstra L. Rev. 861, 929. *See also 1984 Hearings on S. 44, supra* note 1, at 488 (statement of Aaron D. Twerski).

[82] Task Force Final Report, *supra* note 11, at II-10. *See also* Micallef v. Michle Co., 384, N.Y.S.2d 115., 348 N.E.2d 571 (1976) (overruling *Campo* v. *Scofield*, 301 N.Y. 468 (1950)); Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 Ind. L. Rev. 797 (1982).

[83] *Auburn Machine Works Co.* v. *Jones*, 366 So. 2d 1167, 1170-71 (Fla. 1979).

[84] *Technical Chemical Co.* v. *Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972); *Cunningham* v. *Charles Pfizer & Co., Inc.*, 532 P.2d 1377, 1382 (Okl. 1974); *Reyes* v. *Wyeth Laboratories*, 498 F.2d 1264, 1281 (5th Cir. 1974). *See also* Taylor, *Note: Proposed Federal Products Liability Legislation—A Summary and Analysis*, 1 J. of Prod. Law. 103 (1982); *1984 Hearings on S. 44, supra* note 1, at 489-90 (statement of Aaron D. Twerski, Professor, Hofstra University School of Law).

[85] *1984 Hearings on S. 44, supra* note 1, at 490 (statement of Aaron D. Twerski, Professor, Hofstra University School of Law).

b. Warning to Experts

Section 6(d)(2) would immunize the manufacturer from liability for failure to warn the injured person if it warns:

> a using or supervising expert, where the product is one which may be legally used only by or under the supervision of such an expert and the manufacturer acted with reasonable prudence to warn or instruct the expert.

One torts scholar notes that this section "is yet another example of the proliferation of new and heretofore undefined terms." For example, he asks,

> Where are we to turn to explain the term "legally used"? Is it the penal law, the State safety codes, OSHA, administrative regulations, or the common law of torts?[86]

The Restatement recognized that under certain circumstances a manufacturer could absolve itself of a duty to warn the injured person by warning a third party. But the Restatement suggests a four-part balancing test to determine if the warning given to the middleman is reasonably certain to reach the claimant: (1) the risk of injury; (2) the seriousness of harm which might result; (3) the practicability and expense of placing a warning on the product; and (4) the reliability of the middleman as a conduit of the warning.[87] Section 6(d)(2), unlike section 6(d)(1), would eliminate this balancing test even if the manufacturer could foresee that individuals would "illegally" use the product without supervision and be injured.

SECTION 8—PRODUCT SELLERS

Absent the breach of an express warranty made by it or negligence in its handling of a product, a product seller shall be liable for the claimant's harm as if it were the manufacturer if the manufacturer cannot be sued or the court determines that a judgment against the manufacturer would be unenforceable. The purpose of section 8 is to allow the retailer to avoid the trouble and expense of suit, since in most cases ultimate liability lies with the manufacturer.

Section 8, however, would accomplish this purpose in a way that might leave the claimant without any compensation. Under section 8, the court may determine that the claimant can enforce a judgment against the manufacturer and may then dismiss the retailer. By the time the claimant obtains a judgment against the manufacturer, the manufacturer may be bankrupt. The claimant will therefore have no remedy. A torts scholar sets out the following scenario:

> Plaintiff sues the manufacturer of a product and a major retailer who sold him/her the product. By the time that the case is ready to go to trial (4 years after the complaint was filed), the manufacturer has filed for Chapter 11 (not an uncommon occurrence in today's economy). The retailer was dismissed at the time the action was filed because

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[86] *Id.* at 491-92.

[87] Restatement (Second) of Torts § 388 Comment n (1977).

> there was no determination at the time suit was filed that the claimant could not enforce a judgment.

Thus, the professor concludes, "this section is just plain wrong." [88]

SECTION 9—DETERMINATION OF RESPONSIBILITY

Once the determination is made that a manufacturer or product seller violated the standard governing the marketing of a product that causes an injury, it is necessary to determine whether the manufacturer's liability should be barred or reduced by the conduct of the product user and the conduct of others. It is also necessary to determine how damages should be shared when both the manufacturer and other parties are responsible for the injury. Section 9 would make it more likely that a manufacturer would prevail in asserting defenses based upon the conduct of the product user or other parties because the bill would expand the definition of those defenses. Under section 9, the claimant could not recover damages attributable to parties who are not before the court or attributable to "any other cause". In addition, the standards in S. 44 for determining how the damages should be apportioned among the manufacturer and parties other than the claimant are unfair to the claimant.

1. Misuse, Alteration and Modification

Section 9 (c) and (d) broaden the defenses of misuse and alteration or modification. A manufacturer is not liable for the misuse, modification, or alteration of a product unless the claimant's conduct is "reasonably anticipated conduct." The term "reasonably anticipated conduct" is defined such that a manufacturer is absolved of liability even if the misuse, alteration, or modification is foreseeable.

As one tort law professor explains:

> The phrase "reasonably anticipated conduct" is tremendously restrictive. Rather than using the simple negligence notion of foreseeability, the drafters of the October draft chose the words "expected, ordinary, and familiar of the class of persons likely to use or be exposed to the product." To think that this phrase will result in State by State judicial harmony is pure folly. While this definition is better than the language in the original S. 44, it will preclude conduct which may be reasonable, but which might not be "expected" or "familiar". In light of the fact that the phrase "reasonably anticipated conduct" is central to liability in the design defect area, its definition becomes a critical component on limiting liability based on plaintiffs' behavior.[89]

Similarly, Chief Justice Jack Pope of the Texas Supreme Court believes that "the provision probably limits one's duty to intended users. If so, one could put on every product the label 'This product

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[88] 1984 Hearings on S. 44, *supra* note 1, at 492 (statement of Aaron D. Twerski, Professor, Hofstra University School of Law).

[89] *1984 Hearings on S. 44, supra* note 1, at 456 (statement of Andrew F. Popper, Professor, American University Washington College of Law).

is intended to be used by trained workmen.' This would immunize the supplier from liability." [90]

Under current law, on the other hand, the claimant's misuse, alteration, or modification must be unforeseeable before it operates to reduce or bar the claimant's recovery of damages.[91] As the Task Force concluded in 1979:

> The test for establishing whether a plaintiff's conduct in relation to a product should bar his recovery is whether the plaintiff's manner of use was foreseeable. Foreseeability seems firmly accepted as the preferred standard for evaluating the legal consequences of a plaintiff's conduct because of the broad protection which it affords plaintiffs in comparison with other standards.[92]

Dean Prosser explained why the manufacturer should be liable unless the misuse was unforeseeable:

> [T]here are some relatively unusual uses of a product . . . which the seller may reasonably be expected to foresee and guard against; and he may have reason to know of an otherwise unforeseeable use made by those whom the product will reach, and so be required to take precautions. Likewise, even in the case of normal uses, there may be a recognizable danger that the product will get into the hands of children or other wrong people, which will call for steps to guard against it. In such cases, the seller is not relieved.[93]

2. Assumption of Risk

Comment "n" to Section 402A of the Restatement carefully defines assumption of the risk as "the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk." [94] This type of conduct properly does reduce the claimant's recovery.

S. 44, however, expands the definition of assumption of the risk. One tort professor points out his view of the section:

> The purpose of this section is to allow manufacturers to avoid liability for the production of defective products based on the activities of plaintiffs, even if the plaintiffs' activity is in some sense reasonable. It is not hard to see how this will allow for arguments relating to the revival of complex assumption of risk defenses and similar devices repudiated in a number of States designed to avoid liability which would have been otherwise imposed. This will certainly not produce "uniformity." [95]

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[90] *1984 Hearings on S. 44, supra* note 1, at 379 (statement of Hon. Jack Pope, Chief Justice, Supreme Court of Texas representing the Conference of Chief Justices).
[91] *Porter* v. *United Steel & Wire Co.*, 436 F. Supp. 1376 (N.D. Iowa 1977).
[92] Task Force Final Report, *supra* note 11, at II-24.
[93] Prosser, The Law of Torts 669-70 (4th Ed. 1971).
[94] Restatement (Second) of Torts § 402A comment "n" (1977).
[95] *1984 Hearings on S. 44, supra* note 1, at 457 (Statement of Andrew F. Popper, Professor, American Univ., Washington College of Law.

The definition of assumption of risk in section 9(e)(2) requires only that the claimant know of the danger and voluntarily encounter it. The claimant need not unreasonably encounter the danger for his recovery to be reduced.

The drafters of the Uniform Product Liability Act (UPLA) acknowledge that such a definition is unfair to the claimant, since the voluntary use of a product with a known defect may be reasonable:

> [T]here may be cases where an individual voluntarily uses a product with a known defective condition, but the reasonableness of this conduct becomes a matter of dispute. For example, if a person discovers a welt in a tire, should that person be required to stop immediately and call for assistance, or is it reasonable to proceed to a nearby gasoline station to have the tire repaired.[96]

Under UPLA, the jury would have to decide whether the driver in such a case acted unreasonably, before reducing or barring the recovery of damages.

Similarly, the Uniform Comparative Fault Act ("UCFA") does not permit reasonable assumption of the risk to affect the claimant's recovery. As Dean Wade, the principal drafter of the UCFA, has emphasized, reasonable assumption of the risk is simply "not intended to be included within the (Uniform Comparative Fault) Act." [97] In contrast, section 9 would reduce the claimant's damages even if his or her assumption of the risk were reasonable.

Section 9(e)(2) would have a particularly severe effect on injured workers. For example, cases have held that an employee who works with or in proximity to a dangerous piece of equipment under the explicit instructions of his employer has not acted unreasonably and thus has not assumed the risk of being harmed by the equipment.[98] Under section 9, a manufacturer could argue that the employee assumed the risk because his or her activities, although reasonable, constituted a voluntary encounter with the danger.

In general, broadening the defenses under section 9 would affect the right of users of drugs and medical devices to recover compensation for injuries. Some of the Nation's largest women's organizations explain:

> Broadening the defendant's defenses would make plaintiffs in most drug and medical device cases much less likely to recover than they are today. In such cases—whether the plaintiff has DES-caused cancer, has had a Dalkon Shield-caused hysterectomy, or has suffered tampon-caused toxic shock—the manufacturer typically alleges that the plaintiff's injury was her own fault. For example, manufacturers may claim that the plaintiff should not recover because she did not go to see a doctor sooner, or because she did not follow her doctor's instructions.

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[96] Model Uniform Product Liability Act, 44 Fed. Reg. 62724, 62738 (1979).

[97] Wade, *Product, Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 Mercer L. Rev. 373, 383 (1979).

[98] *Merced* v. *Auto Pak Co., Inc.*, 533 F.2d 71, 80 (2nd Cir. 1976) *Broderick* v. *Cauldwell-Wingate Co.*, 301 N.Y. 182, 188, 93 N.E. 2d 629, 632 (1950).

These groups fully recognize that the defenses are "all legitimate ones for the defendant to raise." However, they are concerned that S. 44's expansion of the defenses would make "it more likely that the defendant will prevail, and that the plaintiff will recover less than she would under present law or nothing at all." [99]

3. Camparative Fault and Joint and Several Liability

Section 9 (a), (b), (g) and (h) purport to establish comparative responsibility and retain the doctrine of joint and several liability. Under that doctrine, each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm. Thus, the injured person can get his full recovery from whichever defendant or defendants he or she can most easily recover, and the defendants may then adjust among themselves the amount which each ultimately pays.

One State Supreme Court explains the fairness of the rule of joint and several liability:

> [Joint and several liability] frequently permits an injured person to obtain full recovery for his injuries even when one or more of the responsible parties do not have the financial resources to cover their liability. In such case the rule recognizes that fairness dictates that the wronged party should not be deprived of his right of redress, but that the wrongdoers should be left to work out between themselves any apportionment.[100]

A torts scholar concludes that section 9 "does not fully retain the joint-tort feasor doctrine," since the injured person would be unable to recover any of his damages (1) attributable to parties not before the court, such as bankrupt manufacturers or governmental entities immune from suit, or (2) attributable to other "causes." He explains:

> If one of the parties was partially or totally immune from suit and if, for example, that party's fault percentage was 30 percent, then that party's fault would be subtracted from the total and would not be redistributed among the parties who were at fault. Thus, consider the following hypothetical:
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> "A was injured through the concurring fault of B and C. His damages are $20,000."
>
> "B (municipal government—immune from suit) 30 percent at fault."
>
> "C (Manufacturer)—50 percent at fault."
>
> As I read sec. 9(b)(3), the immune party's fault (B) would be borne by plaintiff [A] and would not be carried by the negligent defendant [C]. Thus, the sections as drafted do not fully retain the joint-tortfeasor doctrine as claimed by sec. 9(g)(2). If sec. 9(b) did not seek to accomplish this

[99] Letter from Women's Equity Action League, American Public Health Association, Business and Professional Women's Clubs, DES Action, National Organization for Women, Public Voice for Food and Health Policy to Members of the Senate. (March 26, 1984).

[100] *American Motorcycle Assoc.* v. *Superior Court,* 578 P.2d 899, 901 (Cal. 1978).

result, it need have only replicated the language of the Uniform Comparative Fault Act.[101]

He is also "deeply troubled" by section 9(b) (1) and (3), which allow the injured person's recovery to be reduced by the amount of harm that can be attributed "to any other cause." Although he finds the meaning of the phrase "totally unclear," he notes that it easily is subject to the following interpretation:

> If it means that "causal agents (such as natural conditions—wind, ice, snow, rain, etc.) are to be assigned fault and then subtracted from plaintiff's recovery, then these sections are substantively unfair and inconsistent with governing case law. Thus, for example, if defective brakes in combination with icy roads cause an accident, a jury could assign 40 percent of the cause to the icy road and subtract this amount from the plaintiff's recovery.[102]

In addition section 9 takes all discretion away from the court in apportioning responsibility. Many courts and commentators believe that applying comparative responsibility mathematically in all situations can be unfair. They feel that courts should have discretion to modify comparative responsibility where justice so requires.[103]

Finally, in testifying before the Committee in support of the bill some witnesses have made much of the fact that section 9 uses a "pure" comparative approach, under which a claimant's recovery is reduced to the extent of his responsibility, rather than a "modified" approach, under which claimant's fault is reduced to the extent of his responsibility except that claimant's recovery is barred if he or she is more than 50 percent responsible. A truly "pure" comparative responsibility approach would indeed be a fair one—but as the foregoing discussion indicates, the manner in which S. 44 defines and applies a claimant's "fault" makes illusory the apparent benefits of the comparative fault approach.

SECTION 10—WORKERS' COMPENSATION

Section 10, employing calculations pursuant to section 9, reduces the claimant worker's damages against the manufacturer by the amount attributable to the negligence of the claimant, of other defendants, and of parties and "causes" not before the court. Section 10 also requires the reduction of the claimant's damages by the amount of workers' compensation benefits to which the employee "is or would be" entitled. Therefore, a determination must be made on the product liability case of the amount of future workers' compensation benefits the claimant would receive. Thus, the workers' compensation issue would be tried both in the product liability suit and in the workers' compensation administrative proceeding result-

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[101] *1984 Hearings on S. 44, supra* note 1, at 493-4 (statement of Aaron D. Twerski, Professor, Hofstra Univ. School of Law). Under section 9(b)(3), the statutory language requires the subtraction of the percentage of responsibility of non-parties or other causes from the total amount of damages. Although other provisions state that joint and several liability applies, it does so only to the remainder left after the subtraction of responsibility of nonparties and other causes.

[102] *1984 Hearings on S. 44, supra* note 1, at 494 (statement of Aaron D. Twerski, Professor, Hofstra Univ. School of Law).

[103] Schwartz, Comparative Negligence (Supp. 1981) at 99 (citing *Cline* v. *Sawyer*, 600 P.2d 725 (Wyo. 1979)); *Daly* v. *General Motors Corp.*, 575 P.2d 1162 (Cal. 1978). *See also Day* v. *General Motors Corp.*, (Civil No. 10,519 N.D. Supreme Court Feb. 2, 1984).

ing in increased transaction costs. More importantly, because of the difficulties involved in having a jury determine workers' compensation benefits, section 10 likely would force an injured worker to exhaust the administrative workers' compensation remedy before instituting a product liability lawsuit.[104]

SECTION 11—STATUTE OF REPOSE

Under section 11, before an injured product user can even assert a product liability claim, he or she must overcome a threshold barrier. Section 11 prohibits suits to recover damages for injuries caused by capital goods that are more than 25 years old if the product was defectively designed or lacked an adequate warning.[105] Thus, as Public Citizen's Congress Watch has noted, if S. 44 were the law, a person injured today by an exploding boiler made in 1960 could sue the manufacturer, but someone injured by a similar machine built in 1958 could not.[106]

Section 11's arbitrary abrogation of the rights of claimants raises serious constitutional questions. In just three years, the courts of five States have held recently-enacted State statutes of repose to violate State constitutions.[107]

Of the 17 remaining States that have enacted a statute of repose, 5 employ a rebuttable presumption that a product after a certain age has outlived its useful safe life. The drafters of UPLA opposed a complete bar in favor of a presumption. They reasoned that an absolute cutoff was "not possible as a practical matter." [108]

Regardless of the constitutionality of the section, the prohibition against institution of lawsuits is unjustified. The argument in favor of a statute of repose presumes that, when a product user is injured by an old product, the injury must have been caused by ordinary wear and tear rather than a defect in the product. This argument overlooks the fact that capital goods are often designed to be used for more than 25 years. Current law overwhelmingly recognizes, as the drafters of UPLA emphasized, that "prolonged use of a manufactured article is but one factor, albeit an important one, in the determination of whether a defect in the product made it unsafe." [109]

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[104] Public Citizen's Congress Watch, Comparison of October 19, 1983 Staff Working Draft of S. 44 with S. 44 as Introduced (1984) (on file with Senate Committee on Commerce, Science, and Transportation). Section 10 also makes no provision for situations in which the workers' compensation award differs from the determination made in the product liability lawsuit. The statutory language, does not establish a procedure for doing so. Any necessity of returning to court to revise the judgment would increase transaction and litigation costs.

[105] Section 11 provides three exceptions to the prohibition of claims for injuries caused by capital goods more than twenty-five years old: (1) where the manufacturer or product seller misrepresented facts about the product or fraudulently concealed information about the product and that conduct was the cause of the claimant's harm; (2) where the harm was caused by the cumulative effect of prolonged exposure to a defective product; and (3) where the harm caused did not manifest itself until after the 25-year period expired.

[106] *1983 Hearings on S. 44, supra* note #1, at 343 (Statement of Public Citizen's Congress Watch).

[107] *Kennedy* v. *Cumberland Engineering Co., Inc.*, 471 A.2d 195 (R.I. 1984); *Heath* v. *Sears Roebuck*, 464 A.2d 288, 123 N.H. 512 (1983); *Lackford* v. *Sullivan*, 416 So. 2d 996 (Ala. 1982); *Bollick* v. *American Barmag Corp.*, 284 S.E. 2d 188 (N.C. Ct. App. 1981), *mod. and aff'd*, 293 S.E. 2d 415 (N.C. 1982); *Battilla* v. *Allis Chalmers Mfg. Corp.*, 392 So. 2d 874 (Fla. 1981).

[108] Model Uniform Product Liability Act, 44 Fed. Reg. 62714, 62733 (Oct. 31, 1979).

[109] Model Uniform Product Liability Act, 44 Fed. Reg. 62714, 62733 (quoting *Tucker* v. *Unit Crane & Shovel Corp.*, 256 Or. 318, 473 P.2d 862 (Ore. 1970)).

SECTION 12—PUNITIVE DAMAGES

Perhaps no provision in S. 44 is so totally out of line with the court decisions of the last 20 years as section 12 on punitive damages. In most States, the victim can quite properly recover punitive damages by proving, for example, that the maker of the defective product was "willfully indifferent to the safety of others".[110] Punitive damages serve as a sanction against egregious conduct. Section 12 would undercut current law in a manner unjustifiable beneficial to manufacturers. Both the right to seek and the ability to recover punitive damages would be curtailed if not in effect eliminated altogether.

Section 12 allows only the first victim settling with the manufacturer of the defective product to receive punitive damages. No other victim could ever receive punitive damages. Furthermore, the amendment is retroactive: it would apply to all cases presently filed except those that have actually gone to trial. Prof. Andrew Popper, in testimony before the Committee on March 5, 1984, called the system a "bizarre lottery" and contrary "to the notions of fundamental fair play inherent in our system of Government." [111]

Recent cases illustrate why punitive damages are a necessary weapon for the control of outrageous behavior. For example, the National Women's Health Network explains why many women have sought punitive damages from the maker of the Dalkon Shield intrauterine device:

> The company put the Dalkon Shield on the market without subjecting the tail string to simple testing. After thousands of women complained of severe pelvic infections which often necessitated the removal of all or part of their reproductive systems, it became clear that the Shield's tail string acted as a ladder providing an easy conduit for bacteria to enter the uterus.
>
> The company refused to halt domestic sales until 1974, after 2,800,000 Dalkon Shields had been sold, yet hundreds of thousands of shields remained lodged in unsuspecting women, and to this date (the company) has refused to issue notices and warnings to these potential victims.[112]

Victims of this defective product have been able to obtain punitive damages. Section 12 of S. 44, on the other hand, would absolutely bar all punitive damage claims against the defective product manufacturer regarding that defect as soon as it settled with a single claimant.

An uncorrected design problem in a military helicopter demonstrates what may happen if punitive damages are essentially eliminated. According to newspaper reports, this product defect discovered 10 years ago may have been responsible for 231 deaths since

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[110] Annot., *Allowance of Punitive Damages in Products Liability Case[s]*, 13 A.L.R. 4th 52, 56 (1982).

[111] *1984 Hearings on S. 44, supra* note 1, at 450 (statement of Andres F. Popper, professor American Univ., Washington College of Law).

[112] *1984 Hearings on S. 44, supra* note 1, at 420–21 (statement of Elizabeth Langer, National Women's Health Network).

1981, though it remains largely uncorrected. The manufacturer has settled all but the first suit out of court, thereby avoiding any claims to punitive damages. Despite knowledge of the defect, the manufacturer still produces the product.[113] This manufacturer finds it more profitable to settle with injured victims than to correct the serious defect in the product. It is only reasonable to expect that section 12 would encourage this kind of behavior. Because of the virtual elimination of the threat of punitive damages, manufacturers would no longer face this deterrent to producing defective products.

Section 12 also transfers the power to determine the amount of punitive damages from the jury to the judge. Some commentators suggest that a jury trial on the issue would be required by the Constitution.

The punitive damage provision also makes it more difficult for even the "lucky" first claimant to obtain punitive damages. Presently, a standard of reckless disregard governs the award of punitive damages.[114] Section 12, however, further requires the claimant to prove that the defendant's conduct constituted "an extreme departure from accepted practice." Thus, as Public Citizen's Congress Watch points out, "if all members of an industry engage in reckless, outrageous conduct, that conduct becomes the accepted practice, and therefore no member of the industry can be held liable for punitive damages." [115] Section 12 also increases the evidentiary standard the claimant must meet: he or she must prove both "reckless indifference" and "extreme departure from accepted practice" by "clear and convincing" evidence, a higher standard than the "preponderance of the evidence" standard under existing civil law.[116]

SECTION 13—SUBSEQUENT REMEDIAL MEASURES

Section 13 would prohibit the admission of evidence of subsequent repairs of a product to prove liability. Under Rule 407 of the Federal Rules and Evidence, the traditional rule, evidence of subsequent remedial measures is not admissible to prove liability. This evidence is admissible, however, to prove such issues as ownership, control or the feasibility of precautionary measures.[117] Although the evidence may often be presented to the jury on these issues, the judge instructs the jury not to consider the evidence on the issue of liability. The original purpose of the rule was to encourage manufacturers to correct defects. It was argued that if it knew the correction could be used against it in a lawsuit, the manufacturer would not correct the defect.[118]

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[113] Charleston News and Courier/The Evening Post, April 1, 1984, at 23-A.

[114] Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1326 (1974); *see also* Ghiardi and Kircher, Punitive Damages, § 6.19 (1981).

[115] *1983 Hearings on S. 44, supra* note 1, at 342 (Statement of Public Citizen's Congress Watch).

[116] *1983 Hearings on S. 44, supra* note 1, at 159 (Statement of Prof. Joseph A. Page, Georgetown University Law Center).

[117] Fed R. of Evid. 407. *See, e.g., Bailey* v. *Kawasaki Kisen*, 455 F.2d 392 (5th Cir. 1972); *Boeing Airplane Co.* v. *Brown*, 291 F.2d 310 (9th Cir. 1961); *Steele* v. *Wiedemann Mach. Co.*, 280 F.2d 380 (3rd Cir. 1960).

[118] *Ault* v. *International Harvester Co.*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (Cal. 1974).

In recent years, the courts have admitted such evidence on the issue of liability.[119] Such evidence is relevant, for the manufacturer would not have made the subsequent improvement unless the improvement would make its product safer. Moreover, critics of the rule point out that it does not create a disincentive to safety. The possibility that evidence of an improvement would be admitted in a pending lawsuit would not cause a manufacturer to forego an improvement that would prevent injuries and resulting lawsuits in the future.

Section 13 would prohibit States in the future from adopting a rule allowing the admission of subsequent repairs to prove liability. It would also change the rule of the majority of States allowing "limited admissibility" by prohibiting the admission of subsequent repairs to prove other issues unless the defendant denies the feasibility of making repairs. Thus, the defendant would essentially determine if evidence of subsequent repairs would be admitted in product liability cases.

One tort law professor concludes that the treatment of the admissibility of subsequent remedial measures in section 13 represents a "lowest common denominator approach." He recognizes that the law is in some disagreement but notes that S. 44 "summarily opted for a rule which provides the greatest measure of safety for defendants." The bill would impose a rule that one court has termed "merely a shield against potential liability." [120]

SECTION 14—STATUTE OF LIMITATIONS

Section 14 would codify a 2-year statute of limitations rule: it adopts the "discovery rule," requiring the injured product user to sue within two years of the time he discovered or should have discovered the harm and its cause. Thus, victims of latent injuries would not be unfairly punished by a "time of injury" statute of limitations rule which may foreclose the opportunity to sue before a latent injury is discovered.

According to a recent survey, the "discovery rule" is the majority rule. Thirty-three States have "discovery rules" that apply to all latent disease cases, and six additional States have a rule limited to specific kinds of latent disease cases.[121] Even those few States that continue to adhere to the traditional "time of injury" rule are changing their rules to make pro-claimant exceptions.

For example, on June 30, 1983, Prof. Joseph Page wrote to the Committee listing 10 States that as of that time had not adopted the discovery rule: Arkansas, Delaware, Georgia, Michigan, Montana, Nebraska, New Mexico, New York, Virginia, and Wisconsin.[122] Within the next few months, the Wisconsin Supreme Court

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[119] *Farmer* v. *Paccar*, 562 F.2d 518 (8th Cir. 1977); *Robbins* v. *Farmer's Union Grain Terminal*, 552 F.2d 788 (8th Cir. 1977); *Ault* v. *Int'l Harvester Co.*, 177 Cal. Rptr. 812 (1974); *Caprara* v. *Chrysler Corp.*, 417 N.E.2d 545 (N.Y. 1981).

[120] *1984 Hearings on S. 44, supra* note 1, at 452 (statement of Andrew F. Popper, Professor, American Univ., Washington College of Law).

[121] Factual Information in Support of Discovery Rule Statute of Limitations for Victims of Toxic Torts in New York State, by assemblyman Mebin Miller (May, 1984) (on file at Senate Committee on Commerce, Science, and Transportation).

[122] *1983 Hearings on S. 44 supra* note 1, at 164 (statement of Jospeh A. Page, Professor, Georgetown University Law Center).

adopted the discovery rule; [123] the Michigan Court of Appeals [124] and a Michigan Federal court [125] adopted the discovery rule; and a Delaware trial court [126] adopted the discovery rule.

In addition, the New York legislature has adopted the discovery rule for Agent Orange cases; [127] and just recently both the New York Assembly and the New York Senate Codes Committee voted unanimously to establish a discovery rule for all latent disease cases and to revive claims that had been previously barred. [128]

The statute of limitations in S. 44 adopts an equitable rule that a growing number of courts currently employs. Section 14 thus does not provide significant new protections.

In summary, Part III of these views has shown that S. 44 shifts the delicate balance between the claimant and defendant in product injury cases and unfairly tips the scales of justice to product manufacturers and sellers. The legislation would not give injured persons any rights they don't already enjoy in many States, and, in fact, would create a whole new series of legal impediments to recovery.

Conclusion

There are three compelling reasons to oppose passage of S. 44:

1. *The bill would not achieve its stated goal of uniformity.* If fact, its many vague and ambiguous provisions would bring confusion and disorder to the product liability system.

2. *The bill is not needed.* There is no evidence of any crisis in product liability law.

3. *The bill is unfair.* S. 44 would deny legitimate victims just compensation for their injuries.

Two hundred years of tort law cannot be compressed neatly into Federal legislation without bringing endless new questions that will demand new interpretation by the courts. This is the aim of the more than 60 pages of S. 44, and it is a clear failure. To pass this legislation would be to foist an ill-considered law on the American public. Not one can possibly benefit from the legal chaos this bill would cause.

S. 44 is one of the worst bills ever to come out of the Commerce Committee. The bill should be rejected.

Ernest F. Hollings.

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[123] *Hansen* v. *A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W. 2d 578 (1983).

[124] *Bonney* v. *Upjohn Co.*, 129 Mich. App. 18, 342 N.W. 2d 551 (1983).

[125] *Yustick* v. *Eli Lilly Co.*, 573 F. Supp. 1558 (E.D. Mich. 1983).

[126] *Stagg* v. *Bendix Corp.*, No. 82C-DE-140 (Del. Super. Ct. Jan. 4, 1984).

[127] *1983 Hearings on S. 44, supra* note 1, at 165 (statement of Joseph A. Page, Professor, Georgetown University Law Center).

[128] *Newsday* May 16, 1984, at 15.

MINORITY VIEWS OF MR. RIEGLE

Although S. 44, as reputed, does attempt to address some problems that now exist in the area of product liability, the bill is also full of provisions that would exacerbate the uncertainty problem and bring about greater confusion.

I recognize that the proponents of S. 44 have made efforts to modify the bill in order to meet objections to the original draft. I fear, however, that in pursuit of a consensus, the goal of uniformity has become secondary. The efforts to address the many concerns with the bill have produced a patchwork of ambiguous legal terms that are open to wide variations of interpretation throughout the State and Federal court system in this country. Upon careful reading of the statute and the majority report, one cannot possibily suppose that the scores of new terms brought forth in the bill would be interpreted uniformly by the many State and Federal courts.

Let us look at just one example of the new and ambiguous terms included in the bill: "Practical Technological Feasibility." The Congressional Research Service of the Library of Congress suggests that the courts would read this language to mean that the measure of safety will be that of the industry standard. Although the proponents of the bill have asserted that the definition of the term is not intended to evoke the industry standard, the language of the statute indicates that the effect would indeed be to allow industry standard as a defense in product liability cases. Thus, if claimants were to firmly establish that the defendant was negligent because they were aware of and *could* have developed a safer technology, the claimant would nevertheless fail to recover. Under the statutory definition provided in S. 44, the claimant would have to prove that the safer technology was "developed, available, and capable of use" when the product causing the injury was manufactured. Therefore, a manufacturer could build an adequate defense on the actions of other manufacturers, and there would be no incentive to perform research to develop safer products.

It is obvious to me that this term and many other terms in the bill add no clarity to our current system. Moreover, they will likely be interpreted by the courts in such a way that will place consumers and workers who are injured by defective products at a great disadvantage in product liability cases.

One of my primary concerns about S. 44 is the manner in which the legislation deals with punitive damages. Quite frankly, I am sympathetic with the argument that the possibility of unlimited punitive damages may be too burdensome on the manufacturers. But let us also remember that under the current system, a company must engage in reckless disregard for safety befor punitive damages are assessed. S. 44 would, in effect, require two separate trials before the assessment of punitive damages. It would prevent such damages from exceeding the compensatory damage award. And it

would prevent the awarding of punitive damages to all but the first claimant in the case of any defective product. Such an approach is rife with questions of an administrative and practical nature.

In sum, while the goal of uniformity in our product liability system may be worthwhile, it is clear that S. 44 will not achieve that result.

DONALD W. RIEGLE, Jr.

MINORITY VIEWS OF MR. HEFLIN

S. 44, the Uniform Product Liability Act, would abolish all State Product Liability laws and substitute for those laws a Federal statute, to be interpreted by the State courts. The bill, as reported, would destroy the body of product liability law that the States have carefully developed to compensate victims of unsafe products and would permanently disrupt the common law process which produced that body of law. Furthermore, passage of this bill would be a further erosion of State authority and responsibility through the exercise of Federal power.

In my opinion, there is no precedent for S. 44's usurpation of State prerogative over tort law. The scope of S. 44's preemption of State tort law would be far broader than any previous Federal law. Also, this bill represents the first time Congress has preempted State tort law without also creating either concurrent Federal court jurisdiction or a Federal administrative mechanism. Earlier Federal preemption statutes such as the Longshoremen's and Harbor Workers Compensation Act and the Federal Employers Liability Act are inadequate precedents because S. 44's preemption of State law would be far broader in scope.

S. 44, as reported, would supersede State standards governing the compensation of all victims of any type of product related injury. In contrast, the Longshoremen's and Harbor Workers Act and the Federal Employers Liability Act only narrowly preempts State tort rules. They supplant State law only for the purposes of establishing the appropriate compensation of maritime workers and railway employees who are injured on the job and whose work is wholly commercially interstate in nature. Each of these acts preempts State laws only for an extremely narrow category of injured parties or for a most unusual and catastrophic type of accident. While usurping the States' traditional right to develop tort standards, the bill nonetheless seeks to impose on the States exclusive responsibility for applying Federal created liability rules. In previous instances of State tort law preemption, Congress determined that when an issue is important enough to warrant preemption, then the Federal Government and courts must assume some of the responsibility for implementing the Federal law. However, S. 44 requires that its federally imposed standards be applied exclusively in the State courts in the absence of diversity jurisdiction.

The law of product liability is the culmination of 150 years of judicial craftsmanship of liability rules which place the cost of injuries caused by defective products on those in the best position to prevent injuries. The State courts have struggled for decades with the problem of how best to allocate the risk and the cost of product related injuries. As a result, a set of equitable rules has been developed which the majority of courts have determined to be the most effective solution to this problem. Those in favor of Federal pre-

emption point to isolated instances of apparently unfair results. I believe, however, that modern product liability rules have thus far accomplished their primary goals; (1) the creation of incentives to insure that defective products are not placed on the market, and (2) the provision of compensation to those injured by defective products who could not prevent the injuries suffered.

Because liability decisions are made under the common law on a case by case basis, the State courts are able to assess the appropriateness of a rule and the particular factual situation presented by the case at hand. The common law thus embodies the flexibility requisite for dealing with the economic and scientific changes that rapidly alter the nature of products and the ways in which defective products cause injury. At the same time, the common law requirement that courts decide cases in accordance with existing precedents insures that liability rules are developed within the bounds of existing judicial decisions and experience. Therefore, the common law provides stability as well as flexibility.

Tort law has been left to the States because, as in other areas of law dealing with the rights and duties of the individual such as contract, domestic, and property law, States are best able to develop and enforce tort liability rules that serve the needs of its businesses and consumers. Individual States can decide how best to prevent injuries or allocate the risks and cost of injuries. These decisions necessarily vary to some degree among States depending upon their history, economy, and demographic composition. Without a demonstration that the current system is responsible for serious economic problems, there is no reason to alter that system.

In contrast to the decades of State experience with tort and product liability law, Congress has little experience or familiarity with the subject. Yet, S. 44, as reported, would implement a rigid, Federal approach. Changing economic and technological conditions will demand revaluation and revision of legal doctrine. Those who favor a uniform product liability act argue that Federal preemption of State product liability laws is needed to create uniformity by replacing conflicting States statutes and court decisions. In my opinion, the Product Liability Act would do very little toward bringing certainty and uniformity to our product liability system. The proposed Federal statute requires the State courts to apply a set of new and often unfamiliar principles. It also requires them to define a variety of new legal terms. Yet, the act provides no final arbiter to interpret the Federal statute. It seems to me inevitable that State courts will interpret many of these concepts differently, giving conflicting meanings to the same terms, and disagreeing in their application of the new law to similar facts. Thus, though the new law of each State will be the same, it will have as many as 50 different interpretations. Under this act, courts may actually create a greater patchwork of product liability rules than currently exist. Also, because we can expect the U.S. Supreme Court to intervene only rarely in this area, there is no reason to expect conflicts among States' interpretations to lessen over time. Without a

compelling argument that product liability reform is needed, or a clear demonstration that a solution to any perceived problem lies at the Federal level, I cannot support such a fundamental change in our legal system.

HOWELL HEFLIN.

MINORITY VIEWS OF MR. LAUTENBERG

I voted against reporting out S. 44, not because S. 44 tries to reform the law on product liability, but because S. 44 does not go far enough. The bill deals with only part of the problem we face.

There are three general goals we should seek in the area of product liability law.

First, we should try to reduce transaction costs. Business in America is groaning under the strain of mounting legal costs. These costs increase with the uncertainty and variability of 50 different product liability systems. Victims, too, spend years in litigation, waiting for fair relief. A clear, understandable, and uniform product liability law holds out the promise of reducing the time and expense of resolving product liability claims.

Second, we need a system that rewards the prudent product maker, and penalizes the imprudent. The courts in some cases have approached a system of absolute liability where a manufacturer can be found liable no matter how careful, or how circumspect it was when it designed a product. The careful manufacturer can be found as liable as if it were negligent. I think that is wrong. If we are to encourage prudent behavior, we have to reward it, by distinguishing between the prudent and the imprudent.

S. 44 tries to accomplish this by rolling back the law on strict liability, and restoring a fault-based standard in design and warning cases. Serious questions still remain as to whether the specific standard in S. 44 is fair so that manufacturers are indeed held to the level of care that the public deserves. There is also a question as to whether the standard is sufficiently clear and unambiguous. If it is not, there will be prolonged litigation to clarify the law, and the goal of reducing transactional costs will be defeated. Still, the general thrust of restoring a fault-based standard makes sense. However, it is not a step that should be taken alone.

That leads me to the third goal of product liability reform. We must find a way to compensate the victims and to make them whole. This is what is driving the courts of my State—a very laudable effort to achieve justice. The court in *Beshada* v. *Johns-Manville Products Corp.*, 90 NJ 191 (1982), sought justice, for instance, for the thousands of individuals who, through no fault of their own, are being robbed of the breath of life because of asbestosis. The question is, who should bear the burden of that harm, if the manufacturer is not proved at fault? Should the manufacturer bear the burden, as the courts of New Jersey have declared, or should it be the worker who is slowly dying, or the worker's family. A problem with S. 44, as reported, is that it would have some asbestos victims, and other victims, suffer their injuries alone.

The case of asbestos product injuries is an indication of a larger problem. It is a problem that encompasses the DES victims, who cannot identify the maker of the drug their mothers took, that

caused them cancer a generation later. It is a problem that encompasses the increasingly complex products that we deal with today. There are products with unknowable hazards, but hazards nonetheless. Are we prepared to say that those hazards are simply the risks we bear in a modern society? Or should we say that one duty of a modern society is to temper that risk—by establishing a system for compensating the hapless victims.

I do not believe that tort reform should proceed without a tandem effort to establish an administrative system of compensation for persons injured through no fault of their own by defective or unreasonably dangerous products. The Congress is already grappling with the challenge of fashioning compensation systems. It has before it proposals for compensating people for injuries caused by vaccines, for injuries caused by asbestos, and for injuries caused by unranium. In a related context, the Congress is considering proposals for compensating victims of injuries caused by toxic wastes. Clearly, there is a growing realization that the tort system is inadequate to meet the demand for justice in our complex society. And there is a growing realization that we must meet the challenge to provide justice through alternative means.

S. 44, as reported, would ignore this challenge. For that reason, I cannot support it, and I believe it would be unwise for the Senate to proceed with legislation that addresses only part of the problem we face. I am willing to work for and to support a Federal law on product liability that links the concepts of tort reform and compensation. I believe that such a comprehensive solution can be fashioned, ultimately, that would be fair to both business and consumers, and could draw the support of both. But, we have a long way to go to reach that point. S. 44 does not take us there.

FRANK R. LAUTENBERG.

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